UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation

Application of Burt Neuborne for an
Award of Post-Settlement Counsel Fees

Case No. Civ-06-983(ERK)(JO)

Case No. CV 96-4849 (ERK)(JO)
Consolidated with CV 99-5161 and
CV 97-461 -

Declaration of Burt Neuborne in Support of Application for an Award of Attorneys' Fees for Post-Settlement Services Rendered to the Plaintiff-Classes as Lead Settlement Counsel

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Declaration of Burt Neuborne in Support of Application for an Award of Attorneys' Fees for Post-Settlement Services Rendered to the Plaintiff-Classes as Lead Settlement Counsel [1]

Part I: A Description of My Activities as Lead Settlement Counsel

An Overview of this Fee Application

1. (a) My name is Burt Neuborne. I submit this declaration in support of an application for an award of attorneys' fees in the amount of $4,088,500 in connection with the expenditure of

[1] The material in this declaration is drawn from four documents previously submitted to the Court in support of this application. Declaration of Burt Neuborne, dated November 1, 2005; Supplemental Declaration of Burt Neuborne, dated January 31, 2006; Second Supplemental Declaration in Support of Application for Attorneys' Fees, dated February 24, 2006; and Supplemental Declaration Correcting Factual Errors in Swift Memorandum of Law, dated March 3, 2006. At the Court's suggestion, the four documents have been merged into this omnibus Declaration of Burt Neuborne, dated March 17, 2006, in support of the application. The Court has directed that similar omnibus documents reflecting opposition to the application be filed by Messrs. Swift and Dubbin on March 17, 2006.

This omnibus declaration consists of three parts. Part I (pp.1-77) is a detailed narrative description of my activities as Lead Settlement Counsel. Part II (pp. 78-87) places the objections to this application in context. Part III (pp. 87-136) is a recitation of the facts conclusively refuting all objections posed in the papers submitted by Mr. Dubbin and Mr. Swift to date.

8,178.5 hours from January 31, 1999-September 30, 2005, as Lead Settlement Counsel. During that period, my legal services played a major role in the successful implementation of the $1.25 billion settlement agreement, the distribution of approximately $800 million to members of the settlement classes to date, and an enhancement in the value of the settlement fund by at least $50 million. The requested award is approximately 75% of my true market lodestar of $5,731,900.

(b) I have served as a settlement counsel in this matter since the signing of the settlement agreement on January 26, 1999, and as Court-designated Lead Settlement Counsel since April 1, 1999. Prior to the execution of the settlement agreement, I had served, since January, 1997, at the Court's request and with the consent of all counsel, as co-counsel for all plaintiffs. I organized the plaintiffs' Executive Committee in February, 1997. Indeed, the Court has characterized my pre-settlement activities "as the glue that held [the Executive Committee] together." *In re Holocaust Victim Assets Litig.*, 270 F. Supp. 2d 313, 316 (EDNY 2003). On June 17, 1997, I submitted a separate Memorandum of Law effectively articulating plaintiffs' legal theories. See Exhibit F to this Declaration. On July 31, 1997, at the Court's request, I drafted and filed the amended complaints that set forth the plaintiffs' claims for relief. On August 1, 1997, I led the eight hours of oral argument before the Court in opposition to defendants' voluminous motions to dismiss. During the ensuing 11 months, I participated in the negotiations between the parties held under the auspices of Stuart Eizenstat. On July 28, 1998, I urged the Court to become personally involved in the settlement negotiations herein, and participated in the ensuing intensive negotiations in chambers that culminated on August 12, 1998, in the announcement of a $1.25 billion settlement in principle. I declined to seek a fee in connection with achieving the $1.25 billion settlement.[2] Once the settlement in principle had been attained in August, 1998, I withdrew from active participation in the case. During the period from August 12, 1998-January 26, 1999, I played virtually no role in drafting the written settlement agreement as initially executed on January 26, 1999, or the November, 1998, Escrow Agreement, both of which were drafted in large part by Mr. Swift. See *In re Holocaust Victim Assets Litig.*, 270 F. Supp. 2d 313, 325 (EDNY 2003) (noting that much of Mr. Swift's time charges reflected post-settlement work in drafting the settlement agreement).

2. (a) When it became clear that implementation of the complex and novel aspects of this unprecedented class action settlement required sophisticated and intense ongoing legal attention during the post-settlement implementation phase, I reluctantly agreed, at the Court's urging and at the urging of co-settlement counsel, to serve as Lead Settlement Counsel.[3] Over the past seven

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[2] Under prevailing law in this Circuit governing the award of attorneys' fees in "common fund" class actions, I would have been entitled to a fee of between $5-$10 million for playing a major role in achieving a $1.25 billion settlement. See *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96 (2nd Cir. 2005). Three of the principal counsel for plaintiffs, Michael Hausfeld, Melvyn Weiss and myself, declined to seek attorneys' fees for pre-settlement work in achieving the settlement. Several remaining counsel either submitted reduced fee applications for their pre-settlement work, or had their pre-settlement fee applications substantially reduced by the Court, resulting in a total award of attorneys' fees to date of approximately $7 million, of which more than $2 million has been donated to charity or distributed to named-plaintiffs in the form of recognition payments. See *In re Holocaust Victim Assets Litig.,* 270 F. Supp.2d 313 (EDNY 2003); *In re Holocaust Victim Assets Litig.,* 302 F. Supp. 2d 89, 311 F. Supp. 2d 363 (EDNY 2004), aff'd 424 F.3d 150 (2nd Cir. 2005).

[3] The Court may recall that I initially declined to serve as Lead Settlement Counsel, suggesting that the task be assigned to more experienced counsel with access to greater resources. When my co-counsel and the Court urged me to accept the responsibility, I agreed to serve. See Letter of Burt Neuborne requesting appointment of Messrs. Swift, Hausfeld and Weiss as co-Lead Settlement Counsel, entered on the Docket as Document No. 301; Letter of Michael Hausfeld urging appointment of Burt Neuborne as Lead Settlement Counsel, entered on the Docket as Document No. 302. While I do not regret the decision to accept the Court's

years, I have expended more than 8,000 hours in providing an extraordinary range of necessary legal services to the plaintiff-classes and the settlement fund on a daily basis with an extraordinary degree of success. During my seven years of service as Lead Settlement Counsel, I have necessarily worn more than one hat.

(i) Immediately following the execution of the settlement agreement, acting as counsel to the class as a whole, I developed the plan for implementing the settlement, including the legal underpinnings of a bifurcated class action process utilizing a Special Master to develop and recommend a plan of allocation and distribution in an effort to avoid pitting categories of elderly survivors against each other in an unseemly adversary scramble for severely limited funds. The centerpiece of the innovative plan was a strategy of pre-commitment which asked hundreds of thousands of class members with widely differing goals and potentially adverse interests to agree in advance to be bound by the results of a fair allocation process prior to knowing the outcome of the allocation process. Those class members who declined to pre-commit themselves to be bound by the allocation process were given the opportunity to opt out. In effect, the class was asked collectively to pre-commit to the results of a fair process instead of individually insisting upon a preferred substantive allocation. To its credit, the class overwhelmingly agreed to be bound by the allocation process, enabling the settlement to move forward in a fair, dignified and efficient manner. The Court may recall that 583,000 questionnaires were returned indicating acquiescence in the pre-commitment strategy. Fewer than

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designation, service as Lead Settlement Counsel has imposed substantial physical demands upon me that have rendered it impossible for me to continue an extremely successful private consulting law practice, and have significantly limited my scholarly and *pro bono* activities.

300 objections were recorded. The alternative course would have required the appointment of separate counsel for each discrete category of class-member (Jews, Sinti-Roma, Jehovah's Witnesses; gays and the disabled), plus counsel for each of the five classes (deposited assets, slave labor I, slave labor II, looted assets and refugees), plus counsel for various geographical groupings (former Soviet Union, Eastern Europe, Western Europe, United States, rest of the world), followed by an adversary free-for-all between and among multiple counsel designed to allocate and distribute the funds. Although it was plausible to argue that Supreme Court decisions such as *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997) compelled the use of separate counsel and adversary allocation proceedings, I rejected that course because the economic cost in lawyers' fees would have been prohibitive, and the social costs of pitting Holocaust survivors against each other in an adversary scramble for a pittance at the end of their lives was unthinkable. Instead, I devised a "pre-commitment" strategy that was one part John Rawls and one part Alfred Hirschman, and asked the class to accept it. Much of my post-settlement work has been devoted to: (1) assuring that the fair process agreed to by the class functioned fairly and effectively; and (2) defending the results of the fair process against disgruntled class members who disagreed with the outcome. I do not believe that the objectors in this proceeding have ever understood the true nature of my role as guarantor of the fair process to which the class had agreed. Instead, they have persisted in criticizing me for failing to advance their particular vision of substantive justice when the fair allocation process rejected it.

(ii) In my dealings with Congress, the defendant banks and with objectors to the settlement, I have functioned as a classic advocate for the settlement classes, enriching, enforcing and defending the provisions of the settlement agreement against the outside world. As more fully described *infra*, at 21-23, my advocacy on behalf of the class has played a major role in augmenting the value of the settlement fund by at least $50 million.[4]

(iii) In my dealings with the named-plaintiffs and hundreds of individual class members, I have functioned as an advisor and as a source of information and guidance to assure that their concerns and interests were presented effectively to the Special Master and the Court pursuant to the fair allocation process to which they had agreed. Faithful performance of that responsibility has forced me to assist class members in presenting their claims regardless of whether I agreed with them, and regardless of the existence of competing claims. My task was made somewhat easier because many of the objectors have been represented by separate counsel, rendering it unnecessary for me to advise them.

(iv) In my dealings with the Court, the Special Masters, and the various claims officials (the CRT II in Zurich - for bank account claims; the International Organization for Migration in Geneva - for non-Jewish slave labor and refugee claims; the Conference on Jewish Material Claims Against Germany in New York - for Jewish slave labor and refugee claims; and Special Master Gribetz - for all allocation and distribution issues, including looted assets cy pres claims), I have functioned as the settlement fund's *de facto* general counsel, providing legal advice and counsel to the various arms of the implementing process on a vast array of legal issues ranging, *inter alia*, from construing the often ambiguous settlement agreement, to obtaining access to information needed to administer the claims programs fairly, to federal income taxation, to the treatment of late claims, to the role of evidentiary presumptions, to Swiss immigration and privacy law. I have also provided advice to the various components of the complex settlement process on whether particular matters fell within their discretion, or were governed by law. When discretionary judgments were at issue, I provided precatory advice, but recognized an obligation to defer to the official - usually Judge Korman - vested with the discretionary authority to make the final decision. Once a lawful discretionary judgment was made, I defended the judgment even when it differed from my personal views.

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[4]The three most successful examples of augmenting the settlement fund were: (a) the successful litigation of the dispute over the payment of compound or simple interest by the settlement's escrow fund resulting in the payment of an additional $5.2 million to the fund (*In re Holocaust Victim Assets Litig.,* 256 F. Supp.2d 150 (EDNY 2003)); (b) the successful effort to accelerate the payment of the last installment of the settlement payment ($334 million) by one year in order to generate approximately $22.5 million in additional interest for the settlement fund; and (3) the successful effort by Mel Weiss and myself to persuade Congress to exempt interest earned by the settlement fund (approximately $180 million date) from federal income tax, a benefit to the class conservatively valued at $25 million. See *Economic Growth Tax Relief Reconciliation Act of 2001*, section 803: H.R. Conf. Rep. No. 1836 (June 2001).

(v) Finally, in my role as Lead Settlement Counsel, consistent with the decision of the class to agree to be bound by the outcome of a fair allocation process, I have vigorously defended the lawful determinations of the various claims programs, and the lawful exercises of the Court's discretionary authority to allocate settlement funds, even when, in extremely rare instances, I personally disagreed with the decisions. I defended the outcome of the allocation processes because the key to the remarkable success of the implementation of the Swiss bank settlement agreement was the willingness of the class to bind itself in advance under a "veil of ignorance" to respect the outcome of a fair allocation process, instead on insisting on particular substantive outcomes.[5] In order to make such a pre-commitment strategy work, it was necessary for the Lead Settlement Counsel to enforce the lawful results of the fair process whether or not he personally agreed with each outcome.

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[5]In my opinion, sufficient credit has not been given to the hundreds of thousands of class members who have subordinated their personal interests to the need to pre-commit to a fair allocation and distribution procedure in order to permit the settlement to go forward, even when that might mean the frustration of their personal financial claims. Only a very few survivors,

(vi) Thus, although my precise legal function as Lead Settlement Counsel has varied, in each setting I was self- consciously acting on behalf of the class as a whole in order to permit the implementation of the settlement agreement to move forward, and to facilitate the ultimate distribution of funds to members of the class in accordance with the fair allocation procedures adopted by the class in connection with the fairness hearing. As discussed more fully, *infra,* objectors seek to impose a false dichotomy between my work as an advocate for the class as a whole, and my work in defending the results of the fair allocation processes agreed to by the class. Objectors argue that in certain settings, I represented the Court, not the class. While my work is clearly compensable no matter what label is affixed to it, in fact, all of my efforts have been aimed at advancing the best interests of the class by moving the implementing process forward in an effort to facilitate distributions to class members in accordance with the fair allocation and distribution procedures agreed to by the class at the fairness hearing. In the absence of an enforcement agent, the pre-commitment strategy at the heart of the implementation process would have collapsed. In acting as the necessary enforcement agent, I advanced the best interests of the class, not merely the interests of the Court.[6]

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usually egged on by lawyers seeking to use them to obtain a large fee, have insisted on their personal claims at the expense of the settlement process.

[6]The Court may recall that the only serious disagreement between the District Court and Lead Settlement Counsel during the past seven years took place over this point. On September 13, 2004, in order to assure that no technical issue existed, the District Court appointed Lead Settlement Counsel to provide adversarial defense of the District Court's allocation decision in the Second Circuit. On September 14, 2004, Lead Settlement Counsel responded that while he

(b) My efforts on the settlement classes's behalf have been extraordinarily successful. The unprecedented settlement agreement that I helped to achieve, and the novel "pre-commitment" approach to allocation and distribution that I developed, have withstood waves of legal challenge, often launched by counsel for the objectors in this proceeding. Moreover, to date, the fair allocation and distribution process to which the members of the settlement classes agreed to be bound has succeeded in distributing approximately $800 million to over 300,000 persons throughout the world, including approximately $300 million to Holocaust survivors or their heirs residing in the United States.[7]

(c) Once it became clear that service as Lead Settlement Counsel entailed a massive and sustained commitment of time and intellectual energy, the Court determined that Lead Settlement Counsel should receive compensation from the settlement fund on the same terms as the hourly lodestar compensation payable to the several Special Masters appointed by the

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was honored to defend the Court's allocation decision, he did so, not as a functionary of the Court, but because the proposed allocation fell within the lawful scope of the District Court's discretion, and thus fell within his duty as Lead Settlement Counsel to defend. If, noted Lead Settlement Counsel, the District Court were to act unlawfully, it would be the duty of Lead Settlement Counsel to oppose him on behalf of the class. See *In re Holocaust Vicitm Assets Litig.,* 424 F.3d 132 (2nd Cir. 2005)(upholding District Court's allocation decisions).

[7]Mr Dubbin continues to advance the canard that the settlement's administration has been unfair to poor survivors residing in the United States. Indeed, his public opposition to this application is driven in large part by his demagogic charge that Lead Settlement Counsel has "betrayed" American survivors by acting to enforce and defend the Court's decision to allocate the bulk of the $205 million allocated to the poor pursuant to the cy pres administration of the looted assets class to destitute survivors in the former Soviet Union. His objections to the Court's painfully difficult allocation decision have been resoundingly rebuffed by the Second Circuit. *In re Holocaust Victim Assets Litig.,* 424 F.3d 132 (2nd Cir. 2005). Equally importantly, far from ignoring American survivors, the settlement fund has already distributed approximately $300 million to persons residing in the United States, with more to come.

Court to aid in the settlement's administration. Some confusion exists as to the precise date on which the Court informed Lead Settlement Counsel for the first time that it would be appropriate to seek hourly lodestar compensation for post-settlement work. Lead Settlement Counsel believes that the conversation took place in late March or early April, 1999, in connection with discussions over accepting the role of Lead Settlement Counsel. The Court, apparently, recalls a later conversation that took place in 2000 in connection with a discussion of post-settlement fees for Mr. Weiss. All agree that the matter was discussed in open court at the first hearing on attorneys' fees that took place on January 5, 2001, in which Mr. Swift participated. Whatever the precise date of the first conversation, six settlement counsel (Messrs. Weiss, Hausfeld, Ratner, Mendelsohn, Levin and Shevitz) have filed sworn declarations attesting to their understanding that Lead Settlement Counsel's post-settlement work was to be compensated. See Exhibit G annexed hereto. Mr. Swift's characteristic response to the declarations of co-settlement counsel has been to denigrate them as the unreliable statements of "friends," as if "friends" would file false declarations with the Court. Only Mr. Swift, smarting from Lead Settlement Counsel's successful opposition to Mr. Swift's $12 million fee application on behalf of himself and his "friends" with an unjustified risk multiplier of 2.29, now claims to have believed that Lead Settlement Counsel was engaging in seven years of intense labor without a fee. Since approximately $800 million has now been distributed or firmly allocated to the members of the plaintiff classes; and since the complex legal issues surrounding the structure and implementation of the settlement have now been resolved in favor of the settlement class with an extraordinary degree of success, I believe that it is now appropriate to seek compensation for my services as Lead Settlement Counsel.

(i) Accordingly, I submit herewith quarterly statements covering my efforts for the past seven years seeking hourly lodestar compensation at my market rate of $700 per hour for 8,178.5 hours described in Exhibit C, totaling $5, 731,900. In view of the nature of this litigation, and in an effort to allay any concerns over particular charges, as well as to address any concerns the Court may have concerning an award of market lodestar fees to an academic lawyer, I have discounted my fee request to $4,088,500, which is approximately 75% of my true market lodestar. While I do not believe that any challenge to a particular charge is justified, and while I believe that it would incorrect to impose an "academic discount" on market lodestar fees otherwise commanded by an academic lawyer, I have voluntarily discounted my lodestar by 25% in an effort to expedite this proceeding. I have also refrained from seeking compensation for 200 additional clearly compensable hours that are listed in Exhibit C from August 3-21, 2004, but have been omitted from the calculation of my lodestar because they were inadvertently not added to my total hours. I do not seek compensation for such hours in the hope of avoiding protracted haggling over particular time charges.

(ii) In addition, because my activities have been successful in adding at least $50 million to the settlement fund, over and above the lodestar value of the legal services that I have provided to the settlement classes, I seek a modest common fund award based on the value of the additional assets provided to the settlement classes, but only to the extent that such an award is necessary to permit me to receive my requested fee of $4,088,500, which, in my opinion, constitutes 75% of my true market lodestar. I make this request to make it unnecessary to engage in the unproductive and undignified process of haggling in connection with individual billing entries over a seven year period, a time consuming process that has led to extensive dissatisfaction with the lodestar system of attorney compensation. *See generally*, Manual for Complex Litigation, section 14.121 at 186-196 (4th ed. 2004)(discussing comparison between percentage-fee and lodestar methods of compensation).

(iii) If such an award should become necessary, I believe that my extremely successful representation of the class clearly warrants a modest excellence multiplier at least equal to one already granted in this litigation to Mr. Swift if such an excellence multiplier is needed to bring my total award to $4,088,500. Again, I do not seek an enhancement beyond my requested figure of 75% of true market lodestar. But, if a combination of haggling over particular billing entries, and the Court's concern over awarding market rates to academic lawyers, causes my fee to fall below the originally discounted figure of $4,088,500, I seek an offsetting award for excellence to restore the fee to the modest sum of 75% of my lodestar.

(iv) Finally, I have voluntarily discounted my actual hourly lodestar of $5,731,900 by approximately 25% to $4,088.500. If, for any reason, the Court deems it inappropriate to award my true market lodestar, I do not believe that such a voluntary discount is appropriate and withdraw so much of the discount as is necessary to achieve an award of $4,088.500.

(d) I note that any fee awarded by the Court will be payable from interest earned on the settlement principal, and will not diminish the amount of the original settlement of $1.25 billion. I also note that the number of hours expended by Lead Settlement Counsel (8,178.5) is consistent with - indeed below - the number of hours necessarily expended by the Special Masters.

3. In addition to the quarterly statements that accompanied the original declaration, a number of Exhibits are annexed hereto. Exhibit A consists of a chronological listing of the major legal tasks that I have performed as Lead Settlement Counsel since January, 1999. Exhibit B

consists of a time-line reflecting my principal activities at various points during the administration of the settlement agreement. Exhibit C is a contemporaneously maintained chronological summary of time-charges covering the period from January 1999-September 2005. I have made no effort to include the very substantial number of hours spent in speaking with and advising the literally hundreds of class members who have telephoned and visited me in connection with the settlement. The time-charges in Exhibit C describe the relevant legal task, and reflect the contemporaneously recorded time required to perform it. Exhibit D consists of representative documents prepared during the past seven years. I have made no effort to append even a fraction of the enormous volume of legal documents, memoranda, correspondence, and email correspondence that I have produced as Lead Settlement Counsel. Exhibit D, which consists of 16 loose leaf volumes, is so voluminous that it is bound separately and is available for inspection at NYU School of Law. Exhibit E is my curriculum vitae. Exhibit F is the separate Memorandum of Law submitted in June, 1997 that effectively developed the legal theories supporting plaintiffs' claim for relief. Exhibit G consists of the declarations filed by six co-settlement counsel attesting to their understanding that Lead Settlement Counsel was to be compensated for post-settlement work. Exhibit H consists of declarations from three experienced New York counsel and the Dean of the University of Houston School of Law (a nationally-known bankruptcy expert) attesting to the market rate for legal services performed by a lawyers of Lead Settlement Counsel's experience, ability and reputation in the New York legal market, and in other markets (such as bankruptcy courts) where courts appoint academic lawyers to provide services to clients. Exhibit I consist of numerous press reports describing this application that conclusively establish the existence of "reasonable" notice to the class.

A Summary of Legal Tasks Performed by Lead Settlement Counsel

4. (a) Thus far, in my role as Lead Settlement Counsel, I have defended sixteen appeals to the Second Circuit challenging one or another aspect of the settlement or its administration by the District Court, litigated three adversary proceedings in the District Court, appeared in at least ten District Court proceedings involving the administration of the settlement agreement, petitioned Congress for relief on two occasions, conducted three extensive rounds of re-negotiations with the defendant banks resulting in amendments to the settlement agreement or stipulations resolving conflicts, and provided legal guidance concerning the structure and administration of the settlement on a daily basis. Virtually all of this work has been performed with the knowledge of the Court, often at its request.

(b) Seven of the sixteen Second Circuit appeals required full briefing and oral argument. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2nd Cir 2000)(upholding limited definition of settlement classes); *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir. 2001)(upholding Special Master's proposed allocation formula); *In re Holocaust Victim Assets Litig.*, 282 F.3d 103 (2nd Cir. 2002)(dismissing appeal from court-imposed self-identification requirement in connection with Slave Labor II releases; vacating and remanding on issue of after-acquired companies - issue resolved favorably by stipulation on remand); *In re Holocaust Victim Assets Litig., (HSF),* 424 F.3d 132 (2nd Cir 2005), rehearing denied January 3, 2006 (upholding Looted Assets class cy pres allocation formula; rejecting Mr. Dubbin's challenge to structure of settlement, noting that behavior of Lead Settlement Counsel had been "exemplary"); *In re Holocaust Victim Assets Litig.,* (Dubbin), 424 F.3d 150 (2nd Cir. 2005) (upholding denial of attorneys fee to Mr. Dubbin because his services were "worthless"); *In re Holocaust Victim*

Assets Litig., (DRA), 424 F.3d 158 (2nd Cir. 2005) (upholding denial of cy pres payments to disabled persons with no personal connection to Holocaust); and *In re Holocaust Victim Assets Litig.*, (Pink Triangle), 424 F.3d 170 (2nd Cir. 2005) (upholding denial of cy pres payments to groups representing gays as a group as opposed to individual basis). I filed an additional brief and declaration in connection with the recent round of Second Circuit appeals in opposition to an effort of Mr. Swift, a settlement counsel, to oppose the District Court's decision to continue the bank account claims process. *In re Holocaust Victim Assets Litig.,* (Swift), (unnumbered - referred to panel in 04-1898). 424 F3d at 149, n. 14.

(c) In addition, I filed plenary appellate briefs in the Second Circuit in opposition to two appeals that were withdrawn after the completion of briefing and prior to oral argument. *In re Holocaust Victim Assets Litig.*, (Ramsey Clark-Romani), 00-9593 (challenge to Looted Assets allocation formula)(withdrawn after full briefing); *In re Holocaust Victim Assets Litig.*, (Katz Estate), 04-9595 (challenge to cy pres administration of Looted Assets class)(withdrawn after full briefing).

(d) In addition to the above-described ten fully-briefed Second Circuit appeals, I have defended four appeals to the Second Circuit that were withdrawn prior to briefing after extensive motion practice and/or discussion. *In re Holocaust Victim Assets Litig.,* (Weiss), 00-9217 (challenge filed by Mr. Dubbin to fairness of settlement) (withdrawn after extensive motion practice and discussion, including unsuccessful effort to "blackmail" the settlement into paying money to Mr. Dubbin's client to induce him to withdraw the appeal); *In re Holocaust Victim Assets Litig.*, (HSF), 00-9614 (challenge by Mr. Dubbin to allocation plan)(withdrawn after extensive discussions); *In re Holocaust Victim Assets Litig.*, (Wolf-Dunaevsky), 00-9103 (challenge to adequacy of representation) (withdrawn after motion practice involving *in forma pauperis* application); and *In re Holocaust Victim Assets Litig.*, (Bloshteyn), 00-9613, 14, (challenges to allocation formula) (dismissed for non-prosecution after extensive discussions with appellants). A fifteenth appeal to the Second Circuit, *In re Holocaust Victim Assets Litig.*, (Schonbrun) (unnumbered)(challenge to fairness and allocation plan), was withdrawn after Lead Settlement Counsel mounted a vigorous challenge to Schonbrun's authorization to challenge the settlement on behalf of his named clients. A sixteenth "contingent" objection and appeal filed by DRA (Wolinsky) challenging the notice given to disabled persons was withdrawn after substantial discussions concerning the governing law.

5. In addition to representing the settlement classes in the sixteen appellate proceedings discussed in para 4, I litigated three substantial adversary District Court proceedings against the defendant banks. *In re Holocaust Victim Assets Litig.*, 256 F. Supp. 2d 313 (EDNY 2002) (Block, J.) (directing banks to pay additional compound interest of $5.2 million on funds held in escrow account); *In re Holocaust Victim Assets Litig.*, 02-3314 (Block, J.) (on remand from 282 F.3d 103; motion to construe settlement agreement to exclude after-acquired companies from receiving slave labor II releases)(successfully resolved by stipulation permitting after-acquired companies to receive slave labor I, but not slave labor II, releases); *In re Holocaust Victim Assets Litig.*, (unnumbered)(Block, J.) (motion demanding access to additional information needed to administer the bank account claims process, and for leave to establish a N.Y.C. claims facility) (resolved successfully by negotiation after lodging motion papers with Court resulting in the June 10, 2004 Amendment 3 to the Settlement Agreement permitting access to the Total Accounts

Database, providing for the publication of 3,100 additional accounts and authorizing a NYC claims facility).

6. In addition to the sixteen Second Circuit appeals, and the three adversary District Court proceedings before Judge Block, I prepared numerous documents and memoranda of law and appeared before Chief Judge Korman representing the settlement classes in connection with at least ten District Court proceedings involving the administration of the settlement. Eg. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.139 (EDNY 2000) (opinion upholding fairness of settlement under Rule 23(e)); *In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist LEXIS 20817 (EDNY November 22, 2000) (opinion upholding allocation plan); *In re Holocaust Victim Assets Litig.*, 270 F. Supp 2d 313 (EDNY 2002) (opinion setting attorneys fees; denying risk multiplier to Mr. Swift and friends seeking $12 million in fees); *In re Holocaust Victim Assets Litig.*, 2003 U.S. Dist. LEXIS 20686 (EDNY November 17, 2003) (opinion allocating supplemental distribution to looted assets and slave labor classes);[8] *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89 (EDNY 2004), rehearing den., 311 F. Supp.2d 363 (EDNY) (rejecting Mr. Dubbin's objections to allocation of looted assets funds; rejecting Mr. Dubbin's fee application); *In re Holocaust Victim Assets Litig.*, 311 F. Supp.2d 407, reconsideration denied, 314 F. Supp. 155 (EDNY) (rejecting cy pres payments to gay and disabled communities). I represented the settlement classes as Lead Settlement Counsel, as well, in the day-long fairness hearing held by the District Court on November 29, 1999; the all-night telephone chambers connection to the fairness hearing held in Jerusalem on December 14, 1999; the day-long hearing on November 20,

[8]See also the unreported memorandum and order of the Court, dated September 25, 2002, upholding proposed allocation of supplemental distribution.

2000 on the Special Master's proposed plan of allocation; and the day-long hearing on April 29, 2004 on the possible allocation of residual funds, at which Mr. Swift unsuccessfully moved for immediate termination of the bank account claims process.

7. In addition to the 29 formal court proceedings described in paragraphs 4, 5 and 6, I expended substantial time on behalf of the settlement classes petitioning Congress on two occasions for legislative relief. As the result of protracted efforts by Melvyn Weiss and myself, Congress was persuaded in June, 2001, to enact special legislation retroactively exempting interest earned by the settlement fund from federal income taxation. See Sec. 803, H.R. Conf. Rep. 1836 (2001). The legislation resulted in an immediate federal income refund of more than $3 million in back-taxes, and relieved the settlement fund of federal income tax obligations on the $180 million in interest earned by the settlement fund since its inception, a benefit conservatively estimated at least $25 million. In addition, the legislation rendered all distributions from the settlement fund exempt from federal income taxation. Since approximately $270 million of the $300 million distributed to date to the deposited assets class would have been fully taxable, even if one assumes the lowest tax rate of 15%, the exemption enhanced the value of the distributions by at least an additional $50 million, without regard to any tax benefits flowing to members of the remaining four classes.[9] Ongoing efforts are also underway to persuade Congress to reverse the effect of the *Garamendi* decision by enacting legislation authorizing states to require insurance companies to disclose all unpaid Holocaust-eras insurance policies as a condition of doing

[9]Under existing law, it is probable that some or all of the $260 million distributed to date to members of the slave labor I and slave labor II classes would have been taxable.

business in the state. Since the effort to lift the bar imposed by the *Garamendi* decision has not yet been successful, I do not seek fees in connection with such efforts.

8. In addition to the sixteen Second Circuit appeals, thirteen District Court proceedings, and two sustained Congressional lobbying efforts described above, at the direction of the District Court, I engaged in three prolonged re-negotiations with defendants caused in large part by omissions and unresolvable ambiguities in the settlement agreement as originally drafted by Mr Swift.

(a) In response to serious objections lodged at the fairness hearings held on November 29 and December 14, 1999, against the original version of the settlement agreement as drafted and negotiated by Mr. Swift between August, 1998-January, 1999, I negotiated Amendment 2 to the settlement agreement over a nine month period, from January-November, 2000, inserting new provisions dealing with recovery of looted art, accelerated payment of the last installment of the settlement amount, access to and publication of information required to administer the bank account claims process, and a modest insurance claims process.

(b) Over a ten month period, from December 2002-September-2003, I negotiated a successful resolution of the dispute over the eligibility of after-acquired companies for slave labor II releases. The negotiation was made necessary because the definition of the slave labor II class included in the original settlement agreement drafted by Mr. Swift was incomprehensible.

(c) Over an eight month period, from December 2003-July, 2004, I negotiated Amendment 3 to the settlement agreement providing for the establishment of a NYC claims facility for bank account claims, publication of several thousand additional bank account names, and access to additional information for CRT II officials, including crucial access to the Total

Access Database (TAD) maintained by the Swiss banks. The negotiation was made necessary by the failure of the original settlement agreement as negotiated by Mr. Swift to contain any provisions on access to information needed to administer the bank account claims process. In the period since the execution of Amendment 3, I have continued to carry on extensive negotiations with the defendant banks, Swiss banking authorities, and the relevant accounting firms in an effort to implement the agreement.

9. Given the unprecedented nature of the Swiss bank settlement, I also found it necessary to expend substantial time seeking solutions to novel problems that did not involve litigating, lobbying, or negotiating with the banks to correct flaws in the original settlement agrement as drafted by Mr. Swift. For example, I played a major role in designing the theory and structure of the settlement's implementation, including the bifurcated proceedings that enabled the District Court to pass initially on the overall fairness of the settlement, followed by the development by the neutral Special Master of a proposed plan of allocation for subsequent presentation to the settlement classes and the Court. Under the plan I developed, class members were asked to pre-commit to the outcome of a fair allocation process under which they enjoyed "exit, loyalty and voice," without knowing the outcome of the fair process in advance. I sought to avoid pitting the elderly members of the settlement classes against each other in an expensive and socially destructive adversary struggle for shares of the settlement. Instead, with the encouragement of the District Court, I assisted all members of the settlement classes in participating in a fair allocation process by expressing themselves directly to the Special Master and the Court. Class members who declined to pre-commit to such a process were given the right to opt out at the fairness hearing. Class members wishing to be separately represented in connection with the allocation

process were encouraged to do so. Once the fair allocation and distribution process had reached a decision, I committed myself to defending it as Lead Settlement Counsel, as long as it was within the range permitted by law. While such an approach was novel, it permitted the implementation of the settlement to go forward with reasonable expedition, in a fair manner, at reasonable cost, and without creating artificial destructive divisions within the victim community. However, precisely because such an approach was unorthodox, especially in view the Supreme Court's opinion in *Amchem*, its development, implementation, and defense, especially against waves of legal objections from Mr. Dubbin and his colleagues, was time-consuming and extremely challenging. To this day, neither Mr. Swift nor Mr. Dubbin appear to understand the role of Lead Settlement Counsel under the class's pre-commitment strategy. Instead of recognizing that it is my duty to enforce the lawful results of the fair allocation process adopted by the class, they excoriate me for failing to insist on allocations favoring the favored segments of the class that they represent. Their unrelenting adversarial behavior throughout the implementation phase on behalf of a narrow slice of the entire class is merely a hint of what the implementation process would have looked like in the absence of the pre-commitment strategy that I devised.

10. Finally, the day-to-day responsibilities of acting as *de facto* general counsel to a $1.25 billion eleemosynary entity committed to spending itself out of existence in accordance with law required constant attention, ranging from assistance in establishing and carrying out an initial notice program of unprecedented scope and complexity and a subsequent notice program of less ambitious scope;[10] establishing a mechanism for holding, investing and paying out settlement

[10]Principal credit for the successful implementation of the notice program is owed to Morris Ratner.

funds; monitoring the settlement's investments; developing, implementing, and overseeing a payment mechanism; assisting the Special Masters and the Court in resolving legal problems incident to the administration of the various claims processes, such as the treatment of late claims, establishment of burdens of proof and presumptions, establishing appeal mechanisms, processing appeals, and establishing mechanics for distribution; monitoring invoices; assisting officials of CRT II to comply with Swiss law; providing counsel to the Court and Special Masters concerning the scope of their powers and responsibilities; describing the settlement to interested communities; and defending the settlement against unfair public criticism and ideological assault, especially by Holocaust deniers.

The Impact of Lead Counsel's Activities on the Size of the Settlement Fund

11. (a) As noted above, my actions as Lead Settlement Counsel have played a principal role in augmenting the value of the settlement fund.

(i) For example, after hotly contested litigation before Judge Block, the class recovered an additional $5.2 million in additional compound interest payments from the defendant banks in connection with funds held in the escrow account. *In re Holocaust Victim Assets Litig.*, 256 F. Supp. 2d 313 (EDNY 2002) (directing banks to pay additional compound interest of $5.2 million on funds held in escrow account).

(ii) Similarly, the accelerated payment schedule agreed to by the defendants banks, resulting in the immediate payment of the final $334 million installment of the settlement payment, that I negotiated as part of Amendment 2 to the settlement agreement enabled the settlement fund to earn approximately $22.5 million in additional interest payments in connection with the accelerated installment.

(iii) Perhaps most importantly, Congress was persuaded by Lead Settlement Counsel, working closely with Mel Weiss, to exempt all interest earned by, and all distributions from the settlement from federal income taxation, thus achieving income tax savings for the settlement fund of approximately $25 million on the $180 million in interest earned to date, and income tax savings for the beneficiaries conservatively estimated at $50 million. See Sec. 803, H.R. Conf. Rep. 1836 (2001).

(iv) A modest insurance claims program negotiated as part of Amendment 2 included a potential increase in the settlement fund of $50 million, although the actual increase will be much lower, approximating $1 million.

(v) Finally, opposition to attorneys' fee petitions deemed to be excessive, including fee applications totaling $17.9 million by Messrs. Swift and Dubbin on behalf of themselves and their friends, pared considerably more than $10 million in attorneys' fees from the fees payable from the settlement fund.

(vi) Thus, if one considers the minimum economic benefit for each above-described activity, my work as Lead Settlement Counsel has played a substantial role in adding considerably more than $50 million in hard dollars to the settlement fund.[11]

(b) Conversely, certain of my legal activities have prevented dilution of class members' *per capita* share of the settlement fund. For example, limiting the definition of the class to the five named targets or victims of Nazi persecution, prevented a massive influx of additional class

[11]Under prevailing common fund fee norms, substantial legal efforts that generate a $50 million benefit for a class generally receive compensation considerably in excess of the fee sought in this application, whether calculated on a lodestar or a percentage of recovery basis. See *Wal-Mart Stores. Inc., v. Visa U.S.A. Inc.*, 396 F.3d 96 (2nd Cir. 2005).

"national origin" members that would have dramatically diluted the funds available for existing class members. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2nd Cir 2000) (upholding narrow definition of settlement classes). Similarly, defending the self identification requirement for slave labor II releases, and avoiding the issuance of slave labor II releases to after-acquired companies, prevented a massive influx of additional claimants. *In re Holocaust Victim Assets Litig.*, 282 F.3d 103 (2nd Cir. 2002) (dismissing appeal from court-imposed self-identification requirement in connection with slave labor II releases; vacating and remanding on issue of after-acquired companies - resolved favorably by stipulation on remand). Certain of my legal activities were designed to make possible the orderly and fair administration of the claims programs in order to permit the orderly distribution of funds to the class members. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.139 (EDNY 2000) (opinion upholding fairness of settlement under Rule 23(e)). For example, Amendments 2 and 3 to the settlement agreement, assure the flow of information to CRT II needed to administer the bank account claims process. Finally, certain of my legal activities were designed to defend the efficient and humane allocation and distribution of the settlement fund by making it possible to evolve a fair allocation plan without pitting elderly survivors against each other in an economically and socially ruinous adversary process. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir. 2001)(upholding Special Master's proposed allocation formula); *In re Holocaust Victim Assets Litig.*, (HSF), 424 F.3d 132 (2nd Cir 2005), rehearing denied, January 2, 2006, (upholding Looted Assets class *cy pres* allocation formula; rejecting challenge to structure of settlement filed by Mr. Dubbin).

The Precise Nature of the Fee Sought

12. (a) The post-settlement legal services for which I seek compensation were almost always provided at the specific request of the Court, permitting the Court to assess both the necessity for the services, the time reasonably expended in providing the services, and the quality of the services themselves. I believe that my legal activities over the past seven years fully justify an award of fees for my post-settlement work as Lead Settlement Counsel calculated at my true market hourly lodestar rate of $5,731,900.[12] In this application as originally filed, I voluntarily reduced my lodestar by approximately 25% (which translates into 2,000 free hours), and sought a discounted award of $4,088,500. I do not believe it equitable or legally justified to discount my market lodestar further.

(b) I have been informed that the Court is considering whether, despite *Blum v. Stenson*, 465 U.S. 557,562 (1984) and the virtually universal practice to the contrary, the lodestar of an academic or a public interest firm in a common fund case may be reduced to sub-market rates to reflect an academic's lower overhead. Presumably, a similar discount would be required for a public interest firm, or single practitioner with low overhead costs. Under such an approach, the mediocre work of an inefficient large firm with a large overhead would command a higher lodestar fee than the brilliant legal work of an academic, a single practitioner, or a public interest

[12]As discussed more fully, *infra,* my market lodestar reflects a $700 hourly rate applied to 8,178.5 hours. The appropriate hourly lodestar is the prevailing rate for lawyers of comparable experience and ability in the relevant market. *Farbotko v. Clinton County*, 433 F.3d 204, 208 (2nd Cir. 2005). See Exhibit H for declarations of experienced New York lawyers supporting the current hourly figure of $700. Under current Second Circuit practice, the payment of deferred fees covering a seven year period does not carry an interest component. Instead, counsel is permitted to charge current rates for the entire period. *Le Blanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2nd Cir. 1998).

lawyer, even when the value to the class of the lower-cost brilliant legal work is far greater than the value of the high-overhead lawyer. Under the Court's approach, the work of Edward Fagan would command a higher lodestar fee than the work of Lead Settlement Counsel. It is inconceivable that a properly informed class would bargain for such an absurd result. A properly informed class would be interested in results, not in the cost structure of its lawyer. Accordingly, I believe that Judge Posner was correct in insisting that market rates are the key to lodestar calculations, not a search for a cost-plus award that seems "fair" to the presiding judge. See *In re Continental Illinois Securities Litig.,* 962 F. 2d 566, 568 (7th Cir. 1992)("it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order."). The legal issue is discussed *infra* at 112-121.

(c) There is no doubt that my services command $700 per hour in the relevant New York market. See the declarations of knowledgeable New York lawyers set forth in Exhibit H Accordingly, if the Court imposes an "academic discount" on this fee application causing my lodestar fee to fall below $4,088,500, which constitutes 75% of my true market lodestar, I ask that the Court do one of three things: (i) treat my voluntary decision to seek only 75% of lodestar as the equivalent of a discount for low overhead; (ii) grant an offsetting award reflecting my success in increasing the settlement fund by at least $50 million in an amount that would bring my award to $4,088,500; and/or (iii) recognize a modest excellence multiplier in an amount needed to restore my award to $4,088,500.

A Detailed Description of the Legal Services Provided by Lead Settlement Counsel

A. Negotiation of Amendments No. 2 and No.3 to the Settlement Agreement

(December 15, 1999-November 20, 2000)(Amendment No. 2)
(March 2003-July 2004)(Amendment No. 3)

(1) At the direction of the Court, over an eleven month period from December 15, 1999-November 20, 2000, I negotiated, drafted, and implemented Amendment No. 2 to the Settlement Agreement in order to respond to several serious objections that had been raised at the Fairness Hearings held in Brooklyn on November 29, 1999, and in Jerusalem on December 14, 1999, to the settlement agreement as originally drafted by Mr. Swift.

Amendment No. 2 modifies the original settlement agreement in four important ways in order to: (a) permit litigation against Swiss defendants to recover looted art; (b) partially fund the CRT II deposited assets claims program by accelerating the payment of the final $334 million installment of the settlement amount; (c) provide for access to information in the possession of Swiss banks and other Swiss entities needed to administer the settlement's claims programs in a fair and efficient manner; and (d) establish a modest insurance claims program involving two Swiss insurance companies, Swiss Re and Swiss Life, while denying releases to any other Swiss insurance company.

The negotiations that culminated in the signing of Amendment 2 to the settlement agreement were precipitated by four sets of objections to the settlement agreement as originally drafted, which were presented to the Court at the fairness hearings held on November 29, 1999 and December 14, 1999. The first set of objections centered on the impact of the settlement agreement on efforts to recover art objects looted by the Nazis and allegedly disposed of through

Swiss intermediaries. Objectors expressed concern that the preclusive nature of the settlement agreement and accompanying broad releases would make it impossible to pursue Swiss defendants in connection with efforts to recover looted art. At the Court's direction, I negotiated an amendment to the settlement agreement that explicitly authorized actions to recover looted art in the country from which the art was looted, or in the country where the art is currently located. Damage actions were precluded, but actions in the nature of replevin were explicitly authorized. Before agreeing to the venue restrictions, I conducted substantial research to determine whether the geographical restrictions would pose obstacles to effective litigation. I came to the conclusion that such restrictions merely mirrored existing *forum non conveniens* doctrine, and would not prevent litigation to recover art temporarily on display in the United States. Once my concerns were allayed, I persuaded the objectors to agree reluctantly to the compromise language, and reported to the Court that the looted art issue had been resolved. I was careful to insert language permitting efforts to recover cultural patrimony, as well as traditional works of art. While the looted art issue was the least difficult of the outstanding issues, the complexity of the legal issues surrounding international efforts to recover looted art, coupled with the need for caution in adopting an agreement that might inadvertently cause difficulty to those seeking the return of looted art and cultural patrimony, required me to expend substantial time in legal research, negotiation, drafting, and persuasion before the issue could be resolved.

The second issue precipitating Amendment No. 2 was a concern over the funding and structure of the CRT II claims process in Zurich that is designed to administer the deposited assets bank accounts claims program. The first set of issues for negotiation and clarification involved the relationship of CRT II to the District Court. I had earlier expended considerable time in developing a structure pursuant to which the CRT II process, headed by Michael Bradfield and Paul Volcker as Special Masters, would function as an arm of the District Court in resolving deposited assets claims pursuant to rules and standards approved by the Court, with all decisions ultimately reviewable by the Court. Officials of CRT II, many of whom were holdovers from CRT I, an institution designed to adjudicate disputes between bank account claimants and Swiss banks, insisted, however, that CRT II function as an independent entity, without reporting to the District Court. I explained that such a structure was legally untenable, and, over an extended period of time, I persuaded the CRT II officials that they must operate subject to the plenary control of the District Court. The next issue was the funding of the CRT II claims process. The language of the settlement agreement as originally negotiated by Mr. Swift was hopelessly ambiguous on the question of responsibility for financing the claims programs. Once the Volcker Committee's Report was made public on December 8, 1999, it became clear that the CRT II claims process would be both crucial and extremely expensive. My initial response was to argue that ambiguous, poorly drafted language in the settlement agreement imposed the substantial cost of the CRT II claims process on the defendant-banks. The banks vigorously resisted, arguing that the settlement agreement provided that the settlement fund should bear the cost of the claims process. In fact, both sides had significant textual support in the settlement agreement for their respective positions because, as with much of the original settlement agreement, the text was very poorly drafted. After a meeting in chambers on February 3, 2000, with representatives of the Swiss banks, the Court urged me to seek a negotiated compromise, pursuant to which the banks would shoulder an appropriate share of the cost of the CRT II process. I engaged in a series of negotiations with the bank's counsel, and ultimately reached an agreement to accelerate the payment of the final settlement installment of $334 million by one year, and to place the accelerated payment in the escrow fund earning higher daily LIBOR interest rates, as opposed to the 3.78% rate set by the settlement agreement. We also agreed that the banks would pre-pay the interest that would have accrued on the fourth installment. The alteration in payment schedule was estimated to generate approximately $23 million in additional interest earnings for the settlement classes, thus providing the funds to pay a significant portion of the costs of CRT II. I vigorously sought additional funds from the banks in an effort to reach $30 in estimated benefits, but was unable to persuade the banks to increase their offer. After efforts to increase the banks' offer failed, I reported to the Court and recommended acceptance of the accelerated payment schedule as a partial means to fund CRT II. The Court accepted my recommendation. The negotiations were protracted and difficult, involving numerous constituencies with intensely conflicting views.

The third issue requiring re-negotiation of the original settlement agreement was access to information in the possession of Swiss entities needed to administer the various settlement-class claims programs in a fair and efficient manner. Astonishingly, as originally negotiated and drafted by Mr. Swift, the original settlement agreement contained absolutely no provisions governing access to information essential to the administration of fair individualized claims processes. Given Mr. Swift's subsequent opposition to individualized claims processes, and his insistence that settlement funds be distributed *pro rata* with no effort to make individualized determinations, the omission of mechanisms to obtain information needed to administer a fair claims process may not have been inadvertent. Objectors correctly noted that in the absence of access to needed information, it would be impossible to administer a fair bank account, slave labor or refugee claims process. I urged the Court to use its coercive powers under Rule 23(d)(2) to direct all potential releasees to provide access to the necessary information on pain of being denied a release. The Court was reluctant to rely primarily on coercive tactics, in part because of legal uncertainty over the power of an American court to direct disclosure in Switzerland, in part because Mr Swift's failure to have provided for disclosure of needed information in the original agreement might well have been deemed a waiver of the issue, and in part because extended litigation over coerced disclosure would delay payment of the settlement fund to elderly survivors. Accordingly, the Court directed me to re-negotiate an acceptable set of information access rules that would permit the fair administration of a claims program. Beginning in February, 2000, and continuing to this day, I have expended enormous amounts of time and energy in seeking to assure a flow of information to class members and to claims personnel needed to permit fair and efficient administration of an individualized claims process. It is impossible to overstate the difficulty of the issue because of the Swiss defendants' fierce opposition to the disclosure of bank account information. In conducting the initial round of negotiations, I was forced to choose between seeking a detailed set of rules providing for publication of information concerning all accounts, and developing more informal, good faith methods of access to the needed information. I elected the latter course because I feared that a detailed set of rules would take far longer to negotiate, and would, themselves, generate delay and result in constant friction. The issues were complicated by the apparent willingness of the banks to destroy highly relevant data, and the complete lack of trust that existed between the banks and the leadership of CRT II. The issues were made even more difficult by the banks' refusal to comply with Paul Volcker's request that CRT II be granted access to the Total Account Database (TAD), consisting of the combined databases and information regarding all surviving WW II bank account records. After six moths of grinding daily negotiations, the parties evolved a system that provided for the immediate publication of information relating to 21,000 accounts, the establishment of a restricted database of 36,000 accounts, consisting of those accounts identified by the Volcker audit as "probable or possible" unclaimed Holocaust-era accounts, and flexible, good faith access to additional information by the CRT II claims process on a case-by-case basis. A process for assuring the accuracy of published data was achieved, and a series of innovative devices emerged, such as the use of memoranda to files and hypotheticals, to establish guidelines for information access without losing flexibility. While the resulting information access criteria codified in Amendment No. 2 and the accompanying memorandum to files are far from ideal, the information access issue was sufficiently resolved to permit me to recommend its acceptance by the Court, thus opening the way to court approval of the settlement, fair administration of the claims process, and the distribution to date of $800 million to members of the settlement classes.

One important aspect of the ongoing information access issue was resolved when, at the Court's insistence, all Swiss entities seeking releases from the slave labor II class were required to self-identify as a condition of receiving a release. The self-identification requirement was crucial to settlement's ability to administer a slave labor II claims program. The defendant banks vigorously opposed the self-identification requirement and eventually unsuccessfully challenged it in the Second Circuit. *In re Holocaust Victim Assets Litig.,* 282 F.3d 103 (2nd Cir 2002). The issue was made particularly difficult because the language describing membership in the slave labor II class in the original settlement agreement drafted by Mr. Swift was completely incomprehensible.

Given the inadequacy of the original version of the settlement agreement, the complexity of the factual and legal issues surrounding information access to Swiss institutions, the legal uncertainty surrounding the Court's powers to direct disclosure in a foreign country, and the importance of information access to the success of the claims program, it was necessary to expend considerable time and effort in reaching the compromise codified in Amendment No. 2 and the accompanying memorandum to files setting forth the ground rules for information access. Indeed, it was eventually necessary to revisit the issue of information access in connection with the negotiation of Amendment 3 to the settlement agreement, dated June 10, 2004. See *infra* at 35-40.

The fourth issue requiring resolution was the status of insurance releases. The original settlement agreement as drafted by Mr. Swift considered at the Fairness Hearings held in Brooklyn on November 29, 1999, and in Jerusalem on December 14, 1999, appeared to contemplate releases to Swiss insurance companies, except for three named companies against whom litigation was pending in the United States. Objectors, including the Insurance Commissioner of Washington and Lawrence Eagleburger, argued that Swiss insurance companies should not be released in the absence of a claims program calculated to permit claimants to recover on unpaid policies. On December 22, 1999, the Court instructed me to seek to resolve the insurance issue through additional negotiations. Since most of the relevant companies did not appear to be within the *in personam* jurisdiction of the United States courts, the issue was particularly difficult. I informed the defendants that the five settlement classes did not appear to include an insurance class, thus making it impossible to provide a release within the context of the settlement agreement as originally drafted. In response to my position, several Swiss insurance companies opened negotiations on the establishment of a claims process, and the joint payment of up to $100 million in insurance claims on a 50%-50% basis by the settlement fund and the Swiss companies, resulting in a potential addition to the settlement fund of $50 million to be contributed by Swiss insurers. I was extremely skeptical about such an approach, but sought to make the system work in order to provide an opportunity for even a few victims to collect on unpaid Swiss insurance policies that would otherwise be unenforceable in an American court, and unknown to claimants elsewhere. After months of intensive negotiations, a modest program involving two Swiss insurers, Swiss Re and Swiss Life, with adequate surviving records dating from WW II needed to administer a fair insurance claims process was established. Other Swiss insurers who declined to cooperate in establishing a fair claims process, or who lacked surviving records needed to operate a claims program, were excluded from the program, and will not receive releases. The negotiation and implementation of the insurance aspect of the Swiss settlement was enormously time consuming, requiring several trips to Switzerland to inspect the companies' records and extensive discussions aimed at establishing a fair and economically efficient claims process. The net result is a modest one, permitting a small number of victims to obtain payment on Swiss insurance policies issued by two cooperating companies - Swiss Re and Swiss Life - while leaving open the possibility of future action against non-cooperating Swiss insurers. It was crucial, however, to resolve the insurance issue because it was blocking approval of the $1.25 billion settlement and the beginning of distribution to the settlement classes.

As the discussion *supra* demonstrates, the negotiation of Amendment No. 2 between January 1, 2000-August 9, 2000, and its implementation through November 20, 2000, required daily discussions between and among a large group of persons with strongly opposed views, and constant resort to negotiation and persuasion. As my time records reflect, I was continuously and intensively engaged in the negotiations for ten extremely difficult months.

(2) The complex negotiations that resulted in Amendment No. 2 were particularly difficult since it was necessary to balance the often-conflicting views of numerous participants, including multiple co-settlement counsel, including Mr. Swift; numerous individual class members, many represented by counsel; officials of CRT II; officials of ICEP (the Volcker Commission); participants in ICHEIC (a program operated jointly by state insurance administrators and the German insurance industry); the defendant banks and their counsel; non-party Swiss national banks; Swiss banking regulators; numerous Swiss insurance companies; New York State banking regulators, non-party-Swiss institutions, including the Swiss government and cantonal banks, the Claims Conference; the Special Master for Allocation and Distribution, Paul Volcker, several United States Senators, and the Court. As my time records reflect, the existence of such a large, contentious cast of characters caused me to engage in repeated round-robin conferences with individual constituencies in an effort to move the process forward without precipitating counter-productive disputes between and among the participants. The negotiation and drafting of Amendment No. 2 consumed more than six months of intensive daily discussions with multiple parties culminating in the Court's approval of the settlement, as amended, on July 26, 2000, and the entry of a final order approving the settlement on August 9, 2000. The Court is well aware of the grinding nature of the negotiations since counsel reported to the Court at regular intervals, and was not shy about expressing his distaste for the negotiations, and his preference for a more coercive approach by Court. Wisely, the Court insisted that counsel continue seeking a negotiated resolution that, in the long run, would be preferable to an imposed solution.

(3) Implementation of the provisions of Amendment No. 2 during the ensuing four months required two trips to Zurich in order to inspect surviving WW II records of participating Swiss

insurance companies, and daily conferences with affected persons concerning access to needed information in the hands of Swiss authorities. The process finally culminated successfully in the publication on the Internet of information relating to 21,000 Swiss bank accounts on February 5, 2001, and the ultimate cooperation of all non-party cantonal banks in providing needed information to the CRT II claims process. Excerpts from my contemporaneous time records reflecting the time necessarily expended in achieving and implementing Amendment No. 2 are set forth in Exhibit C.

(4) In addition to the substantive items in Amendment 2, the agreement resulted in a one year acceleration of payment of $334 million and the pre-payment of interest on another $333 million into the settlement fund enabling the fund to earn additional interest estimated at approximately $23 million to help fund the deposited assets claims process.

(5) While Amendment 2 provided access to sufficient information to begin a bank account claims process, it failed to resolve all questions of information access. I explicitly retained the right to seek additional information if the experience of administering the bank account claims process indicated that additional information was required. By mid-2003, officials of CRT II had informed me that serious flaws had emerged in the information access process that were complicating the effort to administer a fair and efficient bank account claims process. First, they argued that the initial publication of account information had been incomplete, since so-called Category III-B and Category IV accounts listed in the Volcker audit as “possibly” owned by Holocaust victims had not been published. The banks and Swiss banking authorities had refused permission to publish these names in February, 2001, arguing that they failed to demonstrate an adequate level of probability to justify publication. I did not pose a legal challenge to the refusal to

publish in February 2001 because I did not wish to delay the administration of the bank account claims process. Instead, I reserved the right to seek additional publication in the future if it appeared appropriate to do so. Thus, I resolved to seek immediate publication of the 21,000 names, and deal with the excluded names if the failure to publish them appeared to pose problems to the fair administration of the settlement. In 2003, CRT II officials informed me that a significant number of accounts were being located that did not appear on the published list of 21,000 accounts. They also informed me that proportionately fewer claims were being filed to unpublished accounts, even though they were eligible for matching. I informed the banks that, given the CRT II's experience, publication of the entire list of Volcker accounts was necessary. The banks initially rejected any additional publication. After extensive negotiations, including a trip to Zurich in February, 2004, the parties agreed in Amendment 3 to publish approximately 3,100 additional names. After extensive efforts to assemble and verify the lists, and to secure permission from Swiss banking authorities, the additional publication took place on January 12, 2005.

CRT II officials also expressed concern in early 2003 that working conditions in Switzerland were impeding the speedy completion of the claims process. Immigration regulations complicated the staffing of CRT II. Swiss labor law rendered it extremely expensive to operate more than one eight hour shift. And the difficulty of communicating with CRT II officials in Zurich complicated the day to day processing of claims. Accordingly, CRT II officials recommended the establishment of a satellite claims facility in New York City, linked by computer with the CRT II facility in Zurich. The plan was to permit both facilities to engage in the simultaneous processing of claims. Creation of such a satellite facility posed extremely difficult issues under Swiss privacy law because it was unprecedented for Swiss bank data to be transferred out of the country. After extensive negotiations with the banks and with Swiss banking authorities, the parties agreed in Amendment 3 to establish a secure New York claims facility linked to Switzerland by secure computer connections, and operating under Swiss law as if the facility were located in Switzerland. At my request, Judge Block issued an order providing for the security of all information in the New York facility. The facility was established during the summer of 2004, and is currently supplementing the work of the Zurich facility, although its efficiency has been significantly decreased by the unfortunate refusal of Swiss banking authorities to permit transmission to New York of information concerning accounts in non-party banks that is fully available to the Zurich CRT II facility. I have informed the Swiss authorities that their failure to permit transmission of data concerning accounts in non-party banks may jeopardize the issuance of releases to non-party banks.

Third, CRT II officials informed me during 2003 that the process of matching bank account claims against a restricted database consisting of the accounts identified by the Volcker audit, as opposed to the so-called Total Accounts Database (TAD), consisting of all 4.1 million accounts from the relevant era for which information survived, might be causing a serious distortion in the claims process. CRT II officials indicated that a test conducted by HCPO had indicated that victim-owned accounts may have slipped through cracks in the criteria used by the Volcker audit to identify the accounts deemed “probably or possibly” owned by Holocaust victims. I conducted my own investigation and found that several criteria used by the Volcker audit to exclude accounts appeared highly problematic. For example, automatic exclusion of Swiss-address accounts appeared to eliminate numerous accounts for which victims utilized Swiss addresses to shield the accounts from discovery by Nazis. Similar concerns emerged over the categorical exclusion of accounts with addresses in London or New York, or other cities outside the control of the Reich. I was also concerned over categorical exclusion of accounts indicating post-WW II activity, since the activity may have been by unauthorized persons, or may have simply indicated efforts by family members to learn about an account. I became persuaded that the likelihood of under-inclusion in the restricted database required access to the TAD in order to assure that claims were being fairly processed. The banks initially rejected a demand for TAD access. After extensive negotiations, however, Amendment 3 provided for a series of phased matches of plausible claims against TAD archives to insure that all sources of information are canvassed. After extensive negotiations between and among the banks, Swiss banking authorities, CRT II, and the relevant accounting firms, access has now been gained to the UBS TAD archive established by Price Waterhouse. Technical steps are now being taken to carry out the first experimental match. Characteristically, it was not possible to gain access to the PW archive without the credible threat of court action. Only after I prepared papers seeking a court order, and threatened to file them immediately, did PW allow access.

The banks' initial response to the request for additional publication, the establishment of a NYC claims facility, and access to the TAD was adamantly negative. It required more than a year of negotiations to achieve Amendment 3, which was signed on June 10, 2004. In fact, progress in the negotiations did not occur until I prepared a formal motion seeking all three items of relief, and filed the motion papers, consisting of extensive declarations and a substantial memorandum of law, with Judge Block in late 2003. Only when it became apparent that credible litigation was about to take place did the banks take steps to provide access to additional information. I traveled to Zurich in late February, 2004 and conferred with CRT II officials and the management of the defendant banks, seeking to improve access to needed information. Upon my return from Zurich, I engaged in intensive negotiations with the defendant banks for four months, culminating in Amendment No. 3 to the settlement agreement providing for increased access by CRT II to information needed to resolve bank account claims. The agreement was signed on June 10, 2004, providing for a New York based claim facility connected to Zurich via computer, thus permitting substantial savings in operational costs; additional public notice of approximately 3,100 accounts; and CRT II access to a larger data base for use in processing promising claims. An accompanying confidentiality order was entered by Judge Block assuring that claims operations in New York City would be carried out in accordance with Swiss law. At my urging, Swiss banking authorities approved the new arrangement on July 21, 2004. In light of the successful negotiations, I then withdrew my motion before Judge Block. After substantial effort, approximately 3,100 additional bank account names were published on January 13, 2005. Finally, after very difficult negotiations, including threat of Court action, CRT II officials were able to gain access to the UBS archive maintained by Price Waterhouse in order to begin the TAD match authorized by Amendment 3. Excerpts from my contemporary time records reflecting the time necessarily expended on negotiating Amendment No. 3 are set forth as Exhibit C.

B. Legal Representation in Connection with Contested Matters

The necessity for recurring in-court representation of the settlement classes stemmed from the unprecedented nature of a country-wide class action settlement, and the difficulty of establishing an allocation process that respected the dignity of the claimants, while avoiding economically unjustified and socially destructive competition among categories of elderly

Holocaust victims.

(1) I have represented the plaintiff classes in connection with the following contested matters which were briefly summarized above. The cases are described in somewhat more detail below.

(a) The first issue requiring in-court representation arose out of efforts in October and November 1999 by Polish Holocaust victims to intervene in the proceedings at the District Court level in order to object to the limitation on participation in the principal settlement classes to Jews, Jehovah's Witnesses, Sinti-Roma, homosexuals, and the disabled. *In re Holocaust Victims Assets Litigation*, 225 F.3d 191 (2nd Cir. 2000). The Polish intervenors-objectors argued that Eastern European Holocaust victims should be included in all settlement classes on the basis of national origin. At a hearing on November 22, 1999, the District Court explained that the huge influx of additional "national origin" participants would overwhelm the limited settlement fund, which had not been negotiated on such a broad basis. The Court also explained that national origin victims were free to commence litigation on their own behalf, since they would not be precluded by the existing litigation. Accordingly the District Court denied the motion to intervene.

The proposed- intervenors appealed to the Second Circuit from the District Court denial of their motion to intervene and to re-define the plaintiff-classes. After the filing of appellate briefs and the delivery of oral argument by former-Congressman Paul McCloskey on August 9, 2000, the Second Circuit, on September 21, 2000, upheld the restriction of the plaintiff-classes to defined victims or targets of Nazi persecution. *In re Holocaust Victims Assets Litigation*, 225 F.3d 191 (2nd Cir. 2000). As the Second Circuit's opinion noted, the legal issues raised by the appeal were novel and difficult, requiring careful preparation and argument. Although the Supreme Court had dealt with settlement classes in other contexts, virtually no precedent existed concerning the power of class-counsel to shape the contours of the settlement class by decreasing its size. What law there was dealt with efforts by settlement class counsel to cast the class definition in unfairly broad terms. This appeal, on the other hand, dealt with the power of class counsel to cast the class definition in narrow terms. Since the practical consequences to the settlement were immense - the inclusion of a virtually unlimited number of "national origin" persecutees would have massively diluted the *per capita* value of the settlement - I necessarily expended great care in the briefing and argument of the issue.

I defended the decision by class counsel to limit participation in the settlement to the five defined victim groups that had suffered Nazi persecution on the grounds of religion, race or personal status, and to exclude persons from the class whose persecution was the result of national origin, politics. or economics. As class counsel, I had urged that the plaintiff-classes be increased to reflect the suffering of Sinti-Roma, gays, the disabled and Jehovah's Witnesses at the hands of the Nazis. I had opposed extending the class further because the settlement amount was not designed to reflect the losses suffered by all Nazi victims. The appeal raised novel and complex issues concerning the definition and scope of settlement classes, including the legal effect of pre-certification descriptions of putative classes, and the ethical duties of class counsel to putative members of an uncertified class. The Second Circuit upheld the limited class definition, recognizing that the size of the settlement fund had been keyed to the losses suffered by the Jewish community, and that the "national origin" objectors retained the right to bring litigation on their own behalf. *In re Holocaust Victims Assets Litigation*, 225 F.3d 191 (2nd Cir. 2000).

(b) The second issue requiring in-court representation involved a challenge by a public interest law firm specializing the rights of the disabled (Disability Rights Advocates) to the notice aspects of the settlement. The DRA objectors argued before the District Court that insufficient notice had been given to the disabled members of the settlement classes, and suggested that a substantial payment be made to DRA for the benefit of the disabled community in lieu of additional proceedings. The District Court correctly characterized the objection as a thinly-disguised form of blackmail, and denied the objection. When the objectors appealed, I vigorously opposed the appeal, moving for expedition, and vigorously pressed the objectors to withdraw the appeal as unwarranted and divisive. After substantial discussion, the objections were withdrawn in July, 2000.

(c) The third issue requiring in-court representation involved a challenge to the fairness of the settlement filed on behalf of Dr. Thomas Weiss, a Miami eye doctor, by his counsel, Samuel Dubbin. The Weiss objection challenged the $1.25 billion settlement as inadequate, opposed the treatment of insurance claims, argued that adversary counsel was required for each separate class, and that opt-out should be delayed until the publication of a plan of allocation and distribution. In short, Mr. Dubbin challenged the pre-commitment strategy designed to permit the settlement to move forward without becoming bogged down in a series of expensive and socially destructive adversary proceedings. During November, 1999, I responded to the Weiss objections in series of declarations and memoranda of law supporting the fairness of the settlement, and the settlement's non-adversarial, two-step structure. When the District Court denied the objections and approved the settlement on July 26, 2000 (opinion) and August 9, 2000 (final order), Dr. Weiss appealed to the Second Circuit on September 8, 2000. Since all other appeals from the August 9, 2000 order upholding the settlement's fairness had been dismissed or withdrawn by December, 2000, the Weiss/Dubbin appeal constituted the only obstacle to the achievement of the "settlement date," after which distributions to the class could begin.[13] In September, 2000, arguing that the innovative pre-commitment settlement structure that I had designed was potentially vulnerable under *Amchem*, Mr. Dubbin and his client met with Chief Judge Korman and offered to forego Dr. Weiss's challenge in return for the payment of a substantial sum to Dr. Weiss, and the payment of substantial attorneys' fees to Mr. Dubbin. Chief Judge Korman adamantly rejected the offer, characterizing it as "blackmail," "extortion" and as "beyond the pale." Moreover, when the District Court upheld the Special Master's Proposed Plan of Allocation on November 22, 2000, Mr. Dubbin filed a second appeal on behalf of survivors residing in the United States challenging the allocation plan's fairness, claiming that not enough money was being allocated to survivors residing in the United States.

I vigorously opposed the Weiss/Dubbin appeals. I moved for expedition, and when the appellant failed to comply with the Second Circuit's appellate timetable requiring the filing of Schedules C and D in a timely fashion, I succeeded in having the first Weiss appeal from the Court's fairness order dismissed, thereby permitting the District Court to issue its initial order implementing the distribution plan on December 8, 2000. *In re Holocaust Victim Assets Litig*, 2000 U.S. App. LEXIS 29529 (2nd Cir. November 20, 2000)(dismissing appeal for failure to comply with calendar rules). I then engaged in protracted motion practice in the Second Circuit in

[13] The settlement agreement provided that no distributions could take place until the settlement's final approval by the courts as fair. As a result of the Weiss/Dubbin appeal, that date was delayed until May 30, 2001.

an effort to prevent reinstatement of the appeal. Eventually, the appeal from the fairness order was erroneously restored to the calendar by a single Judge, thereby blocking distribution of funds. I, thereupon, sought expedited consideration of both appeals, resulting in a briefing schedule requiring the filing of a brief and appendix by Mr. Dubbin in both appeals by May 15, 2001. On May 7, 2001, when no appendix had been designated, Mr Dubbin requested another meeting with Chief Judge Korman. After a conversation between Dr. Weiss and the Court in chambers shortly before the due date for the filing of his brief and appendix, Dr. Weiss agreed to withdraw his appeal unconditionally in return for a personal letter from me praising his efforts and expressing my personal but legally non-binding support for the expenditure of funds, if possible, in connection with a feasible and economically viable plan to permit elderly survivors to receive better health care. No such plan has ever been submitted. The withdrawal of the Weiss/Dubbin appeal from the order upholding the settlement's fairness permitted the settlement to go into full force and effect as of May 30, 2001.

Although the Weiss/Dubbin appeal was ultimately withdrawn, I had no choice but to treat it as a major threat to the settlement. I anticipated a substantial brief challenging the unorthodox effort to provide a mutually respectful allocation process, and expended substantial time in preparing my responsive brief, and in persuading the appellant to withdraw the appeal.

(d) The fourth issue requiring in-court representation was the defense of the settlement against multiple objections raised at the two fairness hearings held on November 29, 1999 in Brooklyn and December 14, 1999 in Jerusalem. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000). In my capacity as Lead Settlement Counsel, I represented the plaintiff classes in connection with the Court's decision approving the settlement under Rule 23(e). I participated in two day-long fairness hearings on November, 29, 1999 (Brooklyn), and December 14, 1999 (by overnight telephone to Jerusalem), and submitted three declarations supporting the settlement's fairness, explaining the pre-commitment strategy, and responding to objections posed to the settlement. The declarations set forth the legal and social reasons for the settlement's bifurcated structure and explained the roles of a neutral Special Master and a neutral Lead Settlement Counsel in the development and implementation of an allocation and distribution plan. The declarations explained why the existence of financially unconflicted *pro bono* counsel during the pre-settlement negotiations phase distinguished this settlement from the failed settlement in *Amchem,* where the Supreme Court had found that counsel were unable to represent the entire class because they had a substantial financial stake in the acceptance of the allocation plan contained in the original settlement.[14] In preparation for the fairness hearings, I reviewed hundreds of questionnaires and comments submitted to the Court describing the class's response to the settlement, analyzed the stated objections, and conveyed my responses to the objections to the Court. Multiple objectors challenged the size of the settlement, the fairness of the five settlement classes, as well as the bifurcated structure of the settlement. After the execution of Amendment No. 2 to the settlement, described *supra*, the District Court upheld the settlement on July 26, 2000, substantially accepting the positions articulated in my declarations. *In re Holocaust Victim Assets Litigation*, 105 F. Supp.2d 139 (E.D.N.Y. 2000).

In addition to contesting the objections in court, I sought to persuade critics and objectors of the fairness of the settlement, and was successful in persuading several potential objectors to

[14]Messrs. Dubbin and Swift seek to distort such an explanation into an estoppel against fees for Lead Settlement Counsel in the post-settlement phase.

withdraw their objections. As I have explained, I vigorously defended the settlement against any objector who declined to withdraw an objection. Given the potential for "hold up" present in the Swiss bank settlement, I was particularly aggressive in making it clear that no objector could expect to benefit financially from seeking to delay the settlement. Whenever possible, however, I sought to explain to an objector that his or her concerns were unwarranted, and sought to cooperate with any person who offered constructive criticism of the settlement arrangements.

(e) The sixth issue requiring in-court representation arose out of the publication of the Special Master's proposed plan of allocation and distribution on September 11, 2000. In *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY, November 22, 2000), I represented the settlement classes in connection with the District Court's November 22, 2000 decision accepting the Special Master's recommendations on allocation and distribution. I participated in the day-long hearing on November 20, 2000 on the fairness of the proposed allocation plan, and submitted several declarations in support of the Special Master's proposed plan. In preparation for the hearing, I reviewed the Special Master's proposed plan, reviewed the numerous comments responding to the plan, and provided the Court with my responses to the proposed comments.

The plan was challenged by several objectors at a fairness hearing held in the District Court on November 20, 2000, including Dr. Weiss who was represented by Mr. Dubbin and who claimed that it was procedurally flawed because separate adversary counsel had not been utilized, and the opt-out period had expired before publication of the allocation plan. Dr. Weiss also challenged the plan's allocation, arguing that insufficient funds were set aside for American survivors, and that excessive funds were allocated to the deposited assets class to the detriment of the looted assets class. Dr. Weiss withdrew his appeal from the allocation plan, as well as his appeal from the settlement's basic fairness, in mid-May, 2001.

(f) The seventh issue requiring in-court representation involved a challenge by several Roma-Sinti objectors to the Special Master's plan of allocation and distribution. The Roma-Sinti objectors, represented by former Attorney General Ramsey Clark, argued that the proposed distribution allocated too little to the looted assets class, and too much to the deposited assets class. The objectors claimed that the plan favored Jews at the expense of other victims. I was particularly upset by the Roma-Sinti objections because, for the first time in the settlement process, they openly pitted one racial group against another, and threatened to plunge the allocation process into an ugly round of recrimination and mutual disregard. At the fairness hearing on the allocation plan held on November 20, 2000, the Court rebuked one of the objectors who claimed that the allocation plan was racially discriminatory against Sinti-Roma. The District Court denied the Roma-Sinti objection, and Mr. Clark appealed to the Second Circuit. When I was unable to persuade Mr. Clark to withdraw the appeal, I moved for an expedited appeal, and prepared for a major appellate battle over the allocation plan. Mr. Clark filed a massive appendix, and a 46 page appellate brief that was unique in failing to cite a single legal authority. I responded with a substantial appellate brief defending the settlement and the allocation plan. On the eve of oral argument, Mr. Clark, after meeting personally with the Court and after the Court offered his clients an opportunity to express their concerns personally to the Court, withdrew the Roma-Sinti appeal on July 6, 2001.

(g) The eighth issue requiring substantial in-court representation involved a challenge to the allocation provisions of the Special Master's plan affecting the looted assets class. The Estate of Nathan Katz challenged the Court's decision to adopt a *cy pres* approach to the administration of the looted assets class, arguing that excessive funds were allocated to the deposited assets class to the detriment of the looted assets class. I fully briefed and argued the power of the Court to adopt a *cy pres* approach to the administration of the looted assets class. On July 26, 2001, the Second Circuit upheld the Special Master's allocation plan, ruling that the allocation of $800 million to the deposited assets class was justified by the relative strength of the class's legal and factual claims, and that the Court was empowered to adopt a *cy pres* approach to administration of the looted assets class. *In re Holocaust Victims Assets Litigation*, 413 F.3d 183 (2nd Cir. 2001).[15]

(h) the ninth and tenth issues requiring substantial in-court representation involved two similar challenges by victims to the allocation plan and to the role of the Conference on Jewish Material Claims Against Germany, one of which was led by Eliazar Bloshteyn and the other by Abraham Friedman. After the Court granted the Friedman appeal *in forma pauperis* status, and the Second Circuit appointed counsel for the appellants, court-appointed counsel for the challengers filed an aggressive brief attacking the notice plan utilized in connection with the consideration of the proposed plan of allocation, and the procedures surrounding the adoption of the allocation plan. I responded with a full brief on the merits defending both the procedures surrounding the adoption of the allocation plan, and its substantive criteria, including the use of the Claims Conference as an administrative organ. After oral argument, the Second Circuit affirmed the

[15]On the eve of oral argument, the Estate of Nathan Katz withdrew its appeal on or about July 12, 2001. The Circuit, nevertheless, explicitly approved the use of *cy pres*. Unfortunately, the Katz estate was not able to persuade the Property Commissioners administering the German Foundation's looted assets program that the looting of the property in question had been carried out by a German company.

District Court on July 26, 2001, explicitly upholding the allocation plan and the decision to utilize the Claims Conference as an administrative aid to the Court. *In re Holocaust Victim Assets Litig,* 413 F.3d 183 (2nd Cir. 2001).

(I) The eleventh issue requiring substantial in-court legal representation arose out of a dispute between the parties over the appropriate interest rate payable on settlement funds held pursuant to an escrow agreement negotiated by Mr. Swift on or about November 18, 1998. *In re Holocaust Victim Assets Litig.*, 256 F. Supp.2d 150 (EDNY 2003). The parties had initially agreed in November, 1998 to establish an escrow fund of not more than $10 million to make necessary administrative payments prior to the final approval of the settlement by the courts. Until final approval, settlement funds remained in the possession of the defendants. Since the interest specified in the escrow fund (daily LIBOR) appeared to be higher than the rate specified in the settlement agreement for unpaid settlement funds (3.78% compounded daily), the parties eventually agreed to place the entire $1.25 billion into the escrow fund. Unfortunately, the escrow agreement drafted by Mr. Swift in November, 1998, failed to specify with precision whether simple or compound interest was payable on funds in the account. After paying compound interest on the settlement funds held in the escrow account from November 1998-March 2001, on March 15, 2001, the defendant banks announced that simple interest was payable on funds in the escrow account, precipitating a multi-million dollar disagreement over interest payments. The banks demanded a retroactive refund of "mistakenly" computed compound interest. When, during the summer of 2001, after the final approval of the settlement's fairness by the Courts on May 30, 2001, the settlement assets were finally transferred from the defendant banks to accounts under the direction and control of the settlement classes with Citibank and HSBC, the defendant banks unilaterally retained the disputed interest, making it necessary to litigate the matter. When the Court recused itself, the matter was referred to Judge Block. The parties vigorously litigated the interest rates issues before Judge Block, resulting in a plenary decision directing defendants to pay additional compound interest on the escrow account totaling $5.2 million. In accordance with Judge Block's ruling, the defendants transferred more than $5.2 million in additional funds to the settlement class during July, 2003. *In re Holocaust Victim Assets Litig.*, 256 F. Supp.2d 150 (EDNY 2003).

The defendant banks argued that the poorly drafted terms of the escrow agreement provided for the payment of simple interest. The settlement agreement had provided for compound interest at 3.78% on unpaid balances. I argued that the language in the escrow agreement was also intended to provide for compound interest. I introduced evidence of the custom of the trade in New York banking circles, and stressed the behavior of the banks in initially calculating the interest on a compound basis, and in representing to me during negotiations that compound interest was payable. Judge Block's comprehensive opinion found that compound interest was payable. The litigation resulted in an additional payment of approximately $5.2 million to the settlement fund. In preparation for the proceedings, I engaged in extensive review of the documentary record, prepared a substantial declaration and memorandum of law in support of plaintiffs' position, and presented oral argument before Judge Block. The decision was non-appealable under the terms of the settlement agreement. *In re Holocaust Victim Assets Litig.*, 256 F. Supp.2d 150 (EDNY 2003).[16]

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[16]Incredibly, Mr. Swift, who negotiated the faulty escrow agreement in November 1998, now claims that the ambiguity over the interest rate was my fault because I failed to deal with the

(j) The twelfth issue requiring substantial in-court representation involved a dispute over the scope of the slave labor II class. On July 26, 2000 and August 9, 2000, the Court required prospective slave labor II releasees to self-identify with the Court in order to qualify for a slave labor II release. *In re Holocaust Victim Assets Litigation*, 105 F. Supp.2d 139 (E.D.N.Y. 2000). On November 22, 2000, the Court accepted the recommendation of the Special Master that slave labor II releasees must have been Swiss-owned at the time slave labor was utilized. *In re Holocaust Victim Assets Litigation*, 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. November 22, 2000). On April 4, 2001, the Court issued a list of qualifying slave labor II releasees. See *In re Holocaust Victim Assets Litigation*, 2001 WL419967 (E.D.N.Y. April 4, 2001). The defendant banks appealed to the Second Circuit, arguing that the District Court lacked power to require self-identification, and that after-acquired companies that did not become Swiss until after WW II nevertheless qualified for slave labor II releases. The issue was of substantial practical significance because membership in the slave labor II class is potentially unlimited and is not confined to persons belonging to the five defined victim groups. In the absence of a self-identification requirement, it would have been impossible to develop a notice program calculated to give notice to the potentially unlimited slave labor II class. Moreover, in the absence of self-identification, it would have been impossible to administer a slave labor II claims program.

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issue in connection with my re-negotiation of Amendment 2 during the Winter and Spring of 2000. Apart from the fact that the issue did not arise until a year later, it would have been foolish to have raised the issue in the Spring of 2000, at a point when the banks were paying compound interest on the escrow account. In fact, contrary to Mr. Swift's snide language about "blunders," in connection with the negotiations of the accelerated payment of the final $334 million installment, I induced the banks to represent that once the funds were placed in the escrow fund, they would earn compound interest. Judge Block's favorable ruling turned on that representation.

After an exchange of briefs and full oral argument, the Second Circuit dismissed the portion of the banks' appeal challenging the Court's power to require self-identification of prospective slave labor II releasees, accepting my argument that the time to appeal had expired. *In re Holocaust Victim Assets Litigation*, 283 F.3d 103 (2nd Cir. 2002). The Second Circuit accepted my argument that the time to appeal from the self-identification requirement began to run on November 22, 2000, when the self-identification requirement was first announced by the Court, and not on April 4, 2001, when it was applied for the first time. Since the banks did not appeal until April 28, 2001, the Second Circuit dismissed the appeal as jurisdictionally defective, resulting the *de facto* affirmance of the self-identification requirement.

The Second Circuit also ruled, however, that the banks' companion appeal on the eligibility of after-acquired companies for slave labor II releases was timely. The banks argued that a company that was German-owned during WW II, but had been acquired by Swiss interests after the war, qualified for an unlimited slave labor II release, as opposed to a slave labor I release limited to victims belonging to the five victim groups. The District Court ruled that unlimited slave labor II releases were available only to companies that were Swiss owned during WW II. The Second Circuit reasoned that the time to appeal had been extended by the District Court's informal request in December, 2000 for objections to its after-acquired ruling. Once again, the issue was of substantial practical significance since the potentially unlimited size of the slave labor II class, coupled with the large number of German companies that had been acquired by Swiss interests in the years since WWII, rendered the prospect of a massive increase in the number of covered companies a threat to the structural stability of the settlement.

On the merits, the Second Circuit ruled that the language of the agreement (once again drafted during Mr. Swift's superintendence of the negotiations) was ambiguous, and remanded for a hearing on the parties' intentions. The District Court recused itself on remand, and the matter was referred to Judge Block. I filed a substantial brief and supporting declaration with Judge Block on October 28, 2002, seeking a determination that, under the plain meaning of the agreement, a slave labor II releasee must have been Swiss owned at the point slave labor was utilized. I urged the defendant banks to abandon the effort to obtain slave labor II releases for after-acquired companies. Instead, I urged them to accept a limited slave labor I release. Once the banks had an opportunity to review my brief and declaration, they agreed to a stipulation requiring that a Swiss company have been Swiss-owned during WW II in order to receive a full slave labor II release. Pursuant to the stipulation, companies that became Swiss-owned after WW II are eligible for a Slave Labor I release, which releases them from claims by members of the five victim groups, but does not release them from claims by other victims. The successful result assured that the slave labor II class would not impose an unanticipated drain on the class's resources, and was fully consistent with the settlement class's position from the outset of the controversy.

(k) The thirteenth issue requiring substantial in-court representation involved a challenge by certain survivors residing in the United States to the allocation formula utilized by the Court in connection with the *cy pres* administration of the looted assets class. The District Court ruled in November, 2000, that the looted assets class was incapable of individualized administration because of its enormous size, and the difficulty of proving whether assets looted by Nazis were disposed of through Switzerland. Instead, the Court adopted a *cy pres* plan under which the assets allocated to the looted assets class were dedicated to the support of those survivors most in need.

The Court conducted an extensive investigation and allocated 90% of looted assets funds to Jewish survivors, and 10% of the funds to impoverished non-Jewish survivors, primarily Sinti-Roma. The Court then allocated 75% of the funds allocated for Jewish survivors to extremely poor survivors residing in the former Soviet Union, 14% to survivors in Israel, 4% to survivors in Eastern Europe, 4% to survivors in the United States, 3% to survivors in western Europe, and the rest to survivors elsewhere in the world. The Court reaffirmed the allocation in connection with supplemental distributions that took place in September, 2002, and November 2003.

(l) In *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. September 9, 2005), rehearing denied, January 3, 2006, a small number of class members residing in the United States represented by Mr. Dubbin challenged the District Court's *cy pres* allocation formula in the Second Circuit, seeking a greater share of funds allocated to the looted assets class. The challengers argued that assets allocated to the looted assets class for the relief of poor survivors should be distributed on the basis of a national population quota, and then distributed to poor survivors residing in each country. The District Court had ruled that the funds should be allocated and distributed on the basis of the whereabouts of the poorest survivors, regardless of national boundaries. Prior to the Second Circuit appeal, I had engaged in extensive discussions with persons seeking *cy pres* payments from the settlement funds, including the government of Israel, representatives of American survivors, representatives of British survivors, and affected individuals, in an effort to persuade them to accept the District Court's ruling as both equitable and just. Numerous potential objectors agreed to defer to the District Court's judgment. Unfortunately, a single small group of survivors centered in South Florida represented by Samuel Dubbin insisted on challenging the allocation formula in the Second Circuit. The Second Circuit affirmed the District Court's use of an allocation formula keyed to the whereabout of the poorest survivors, noting that neither legal not equitable support existed for the rival plan. In *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. September 9, 2005), rehearing denied, January 3, 2006.

(i) Mr. Dubbin's unsuccessful challenge to the Court's looted assets allocation formula is a classic example of my duty as Lead Settlement Counsel to enforce the outcome of the fair allocation process to which the class had committed itself at the fairness hearing. Once I determined that the District Court's allocation formula was within the broad range of discretion available to the District Court, my responsibility as Lead Settlement Counsel was to enforce it on behalf of the entire class, even though a segment of the class opposed it. When I exercised such a responsibility, I functioned as an agent of the class as a whole, and not as a functionary of the Court. The integrity of the pre-commitment strategy adopted by the class at the fairness hearing required an enforcement agent to assure that the results of the fair allocation process are carried out. A principal responsibility of Lead Settlement Counsel was to function as the enforcement agent for the fair allocation process on which the integrity of the implementation plan depends.

(ii) Accordingly, it matters not whether my efforts in connection with defending the outcome of the allocation process are labeled as work on behalf of the Court, or work on behalf of the class as a whole. In either case, given the crucial role played by the idea of pre-commitment to the success of this settlement process, the enforcement responsibilities of Lead Settlement Counsel are clearly entitled to compensation from the settlement fund because they are designed to enforce the interests of the class as a whole in the stability and success of the fair allocation process which the class adopted as binding at the fairness hearing.

(m) The fourteenth issue requiring substantial in-court representation involved a challenge by Disability Rights Advocates, a public interest law firm, to the refusal by the District Court to award a *cy pres* payment to the disabled community as a whole in memory of disabled persons who suffered persecution during the Holocaust, but who can no longer be identified. DRA argued that the relatively few disabled survivors located thus far required that an additional *cy pres* payment be made to the disabled community in order to assure equitable distribution of the settlement funds among the victim groups. As Lead Settlement Counsel, I urged the District Court to make a modest *cy pres* payment in memory of unknown disabled victims of Nazi barbarism. Indeed, I arranged for counsel for DRA to make a personal plea to the District Court for a *cy pres* award. In addition, DRA sought to resurrect the objections to notice given to the disabled that it withdrew in July, 2001. I rejected, and vigorously opposed, any challenge to the notice given to disabled persons. The District Court rejected the notice challenge, and rejected my recommendation concerning a modest *cy pres* payment. Instead, the District Court ruled, first, that many persons receiving payments from the settlement fund had, in fact, become disabled as they aged; and, second, that it was improper to divert settlement assets from persons with a direct connection to the Holocaust to members of the disabled community who lacked any connection with the Holocaust. The Second Circuit appeal was preceded by intensive discussion with appellants seeking to resolve objections to the notice program and to resolve issues without litigation. On appeal, I argued that the District Court's ruling fell within the broad range of his discretion, despite my personal suggestion that the Court's discretion be exercised in favor of the grant. In *In re Holocaust Victim Assets Litig.*, 424 F.3d 158 (2nd Cir. 2005), the Second Circuit affirmed the ruling of the District Court as being well within the bounds of its discretion, noting that no victim group, as such, has a legal (as opposed to a moral) claim on the settlement assets. Rather the assets belong to individuals with a common heritage of persecution because of race, religion or personal status.

(i) The DRA appeal is another classic example of my enforcement responsibilities as Lead Settlement Counsel. In this matter, I disagreed with the District Court's ruling, but acknowledged that it was within the broad range of the District Court's discretion. Accordingly, under the pre-commitment rules adopted by the class, it was my duty as Lead Settlement Counsel to defend the outcome of the fair allocation process to which the class had committed itself at the fairness hearing, even though I had opposed the ruling below.

(ii) Thus, the DRA case is an example of Lead Settlement Counsel defending a discretionary judgment of the District Court with which he personally disagreed. It would have been impossible to implement the pre-commitment strategy adopted by the class in the fairness hearing if Lead Settlement Counsel remained free to pick and choose which lawful results of the fair allocation process adopted by the class he was prepared to defend.

(iii) Unfortunately, neither Mr. Swift not Mr. Dubbin appear to understand Lead Settlement Counsel's role under the pre-commitment process adopted by the class. Instead, Mr. Dubbin and his clients unfairly excoriate Lead Settlement Counsel for "betraying" American survivors because Lead Settlement Counsel defended the Court's allocations whether or not he personally agreed with them. In fact, as the Court knows, Lead Settlement Counsel has consistently urged larger allocations for poor survivors in Israel and the United States, but, as with the *cy pres* payments to the disabled community, he was unable to persuade the District Court to accept his personal views. Moreover, Lead Settlement Counsel has urged the Court to make secondary distributions from potentially unused deposited assets funds similar to those urged by Mr. Swift, but has been unable to persuade the Court to do so. Since both sets of decisions clearly lay within the discretion of the District Court, Lead Settlement Counsel accepted the Court's decisions, and enforced them on behalf of the class as a whole, only to be unfairly charged with "betrayal" and other improper behavior by Mr. Dubbin and Mr. Swift.

(n) The fifteenth issue requiring substantial in-court representation involved a challenge by a consortium of homosexual rights organizations, the Pink Triangle, to the District Court's refusal to award a *cy pres* payment to the gay community in memory of homosexual victims of Nazi persecution. In *In re Holocaust Victim Assets Litig.*, 424 F.3d 170 (2nd Cir. 2005), representatives of the gay and lesbian community sought a cy pres award of several million dollars based on the difficulty of locating actual gay and lesbian survivors of the Holocaust. The objectors argued that many qualifying victims were reluctant to disclose their past sexual preferences. In the District Court, I vigorously and repeatedly supported the request for a modest *cy pres* payment to the gay community. The District Court acknowledged the difficulty in locating current gay and lesbian survivors, but declined to shift settlement assets to persons with no personal connection to the Holocaust. Since the decision was within the bounds of the District Court's discretion, I defended it on appeal as an exercise of my duty to act as the enforcement agent for the fair allocation process to which the class had bound itself at the fairness hearing. The Second Circuit appeal was preceded by intensive discussion with appellants. The Second Circuit affirmed the ruling of the District Court. The Pink Triangle appeal is, thus, yet another example of my responsibility as Lead Settlement Counsel to defend the results of the fair allocation process agreed to by the class, even when I personally disagreed with the particular discretionary decision. I express my gratitude to the lawyers for the Pink Triangle who understood my role, vigorously argued their legal position, but made no effort to criticize me personally for carrying out my duties.

(o) The sixteenth issue requiring substantial in-court representation involved a challenge by Samuel Dubbin, a lawyer who has represented a number of challengers to the Court's rulings, to the District Court's refusal to award him a common fund fee. Mr. Dubbin's efforts to collect unjustified fees from the class have proceeded through three stages. On March 15, 2002, Mr. Dubbin filed a grotesque application for $5.9 million in attorneys' fees on his own behalf, and on behalf of Dr. Weiss, for alleged benefits conferred on the settlement fund. When the District Court reacted with incredulity to such a blatant effort to profiteer at the expense of the settlement fund, Dr. Weiss eventually withdrew his fee application. Mr. Dubbin then filed an amended application for an award of $550,000 for work related to insurance, and deferred (but did not withdraw) his request for $3 million in fees for his work on allocation issues. On March 9, 2004, the District Court rejected Mr. Dubbin's absurd claim for $3 million in fees for his allocation-related work, finding that it had not conferred any benefit on the class. *In re Holocaust Victim Assets Litig.,* 302 F. Supp.2d 89, 117-120 (EDNY 2004). On March 31, 2004, the District Court rejected Mr. Dubbin's claim for $550,000, subsequently reduced to $309,000, for his insurance-related work because, in the District Court's words, Mr. Dubbin's insurance-related legal work was "worthless" to the class. *In re Holocaust Victim Assets Litig.*, 311 F. Supp.2d 363 (EDNY 2004). In the decision denying fees, the District Court formally noted the effort of Mr. Dubbin and his client to "blackmail" the class in September, 2000 by conditioning the withdrawal of a fairness appeal on the payment of substantial attorneys' fees to Mr. Dubbin and a substantial payment to Dr. Weiss. *In re Holocaust Victim Assets Litig.*, 311 F. Supp.2d at 374-75; 302 F. Supp.2d at 118.

On appeal, Mr. Dubbin continued to claim that he was entitled to a substantial fee. The Second Circuit affirmed the District Court's fee rulings in all respects. *In re Holocaust Victim Assets Litig.*, 424 F.3d 150 (2nd Cir. 2005).

(i) While Mr. Dubbin is, of course, free to object to this application, it is an astonishing exercise in hypocrisy by an attorney who has: (1) sought to blackmail the settlement fund into paying him an unjustified attorneys' fee of $5.9 million; (2) sought to recover more than $3.5 million in unjustified attorneys' fees for activities that were found to be "worthless; and (3) whose only "contribution" to this historic litigation has been to foment discord and hostility among Jewish survivors by falsely accusing the District Court and Lead Settlement Counsel of unfairly favoring destitute survivors in the former Soviet Union over survivors residing in South Florida. See *infra* at 77-80.

(ii) Unfortunately, several of Mr. Dubbin's current and past clients appear to be acting inconsistently in opposing this application. Mr. Leo Rechter, a leader in the survivor community whose achievements deserve respect and admiration, vigorously opposed the Court's decision to allocate significant portions of the looted assets funds to destitute Jewish survivors in the former Soviet Union, arguing that more funds should be allocated to survivors in the United States. At the same time, Mr. Rechter vigorously supported Mr. Dubbin's application for attorneys's fees in connection with his opposition to the Court's allocation plan in a letter to the Court dated April 25, 2004. Since Mr. Dubbin was seeking to achieve an allocation with which Mr. Rechter agreed, Mr. Rechter was perfectly willing to support an unjustified fee award to Mr. Dubbin. Yet, in connection with my application for fees in connection with seven years of loyal service to the class, Mr. Rechter argues that the settlement is "holy money" that should not go to lawyers. What Mr. Rechter really means, apparently, is that no fees should be awarded to lawyers who disagree with him, but that lawyers who agree with him are entitled to substantial fees, whether or not they have earned them. See *infra* at 84.

(iii) Many of Mr. Dubbin's current and past clients are similarly inconsistent in their approach to this application. Mr. David Mermelstein, a survivor leader residing in South Florida, enthusiastically supported Mr. Dubbin's application for attorneys' fees in the Hungarian Gold Train case totaling approximately 15% of the modest $25 million recovery for survivors. Mr. Mermelstein has also repeatedly supported Mr. Dubbin's various fee applications in this case. Yet, despite my *pro bono* work in achieving a $1.25 billion settlement for survivors, my seven years of loyal service to the class involving more than 8,000 hours, and my success in adding more than $50 million to the settlement fund, Mr. Mermelstein opposes this application. The sad fact is that Mr. Mermelstein and his colleagues are so blinded by their opposition to the Court's decision to allocate the bulk of the looted assets funds to destitute Jews in the former Soviet Union, and so angry over the Court's insistence on continuing the deposited assets claims process, that they are unfairly venting their anger at the lawyer whose job it has been to defend and carry out the allocation decisions on behalf of the class as a whole. See *infra* at 86-87.

(p) The seventeenth issue requiring substantial in court representation involved assistance to the Court in determining the attorneys' fees payable to class counsel for their efforts in achieving the settlement. The District Court noted that the adversary process often breaks down in connection with the award of pre-settlement fees because the defendant no longer maintains an interest in the process, and because a potential conflict of interest exists between counsel seeking pre-settlement fees and the class. Since, noted the District Court, it is often difficult to assess the value of pre-settlement work that was carried out outside the knowledge and purview of the District Court, it is often difficult for a District Judge to assess the value of the pre-settlement work. Accordingly, the District Court requested Lead Settlement Counsel, who had waived fees for pre-settlement work in achieving the settlement and who, therefore, had no axe to grind in the pre-settlement fee process, to review the fee applications and provide the Court with advice on the relative value of the legal services involved. The task was extremely distasteful, forcing Lead Settlement Counsel to disappoint and anger lawyers with whom he had worked during the pre-settlement phase. When the Court persisted in requesting advice, Lead Settlement Counsel reluctantly performed the task of reviewing all fee application and providing advice to the Court on each. At the Court's request, I reviewed all fee applications, and made recommendations to the Court. All told, I filed responses to attorneys fees requests that totaled considerably more than $25 million. I argued three principles to the District Court governing fees. First, I opposed the award of a risk multiplier to any counsel for pre-settlement work. I reasoned that since at least three competent class counsel had agreed to handle the litigation on a *pro bono* basis, it was not necessary to award risk multipliers to induce competent counsel to prosecute the litigation. Second, I urged that lawyers who had worked on the cases and had contributed to the achievement of the settlement be awarded full hourly lodestar fees for their efforts. Finally, I argued that Mr. Swift, who had worked extremely hard to achieve the settlement, should receive a modest 1.32 excellence multiplier because I did not think that his hourly lodestar adequately reflected his contribution to the settlement. The District Court accepted my recommendations, characterizing them as "generous" toward Mr. Swift. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 326 (EDNY 2002).

(i) Unfortunately, despite my successful advocacy of an excellence multiplier for his pre-settlement work, Mr. Swift has never forgiven me for opposing the 2.29 risk multiplier that he sought in this case in connection with a fee application of $12 million on behalf of himself and his friends. When added to his resentment of my vigorous defense of the refusal of the District Court to accept his suggestions for implementing the settlement, Mr. Swift's anger over my partial opposition his fee application explains his opposition to this application.

(ii) In preparation for hearings on the fee applications, I reviewed multiple fee applications from numerous attorneys. Once the Court's opinion was issued, I continued to review pending fee applications, including resolving the fee application of Edward Fagan, in connection with which substantial payments were made by Mr. Fagan to named-plaintiffs in the form of recognition payments. The resolution of Mr. Fagan's fee application raised difficult questions of conflict of interest law, since, during the negotiation phase, he simultaneously represented the class and an individual with potentially conflicting interests. The issues were resolved to the benefit of the class.

(iii) Yet a third fee issue involved the compensation of Christophe Meili, a Swiss bank guard who exposed the banks' actions in wrongfully destroying documents during the pendency of the litigation. Mr. Meili was threatened with criminal prosecution for having revealed the improper behavior, and was forced to emigrate from Switzerland. Class counsel determined to pay Mr. Meili a significant sum to acknowledge the assistance his courageous behavior had afforded to the litigation. Mr Swift wished to inflate his reported legal fee by the amount to be paid to Mr. Meili, and to transfer the funds to Mr. Meili. I objected, arguing that the payment must be made openly and in accordance with an authorization of the Court. The Court accepted my recommendation, and Mr. Meili was compensated. The payment of compensation to Mr. Meili was complicated because Mr. Meili had been represented by Mr. Fagan, who delayed the settlement until the class agreed to pay Mr. Meili a significant sum. I argued that since Mr. Fagan could not represent both the class and Mr. Meili simultaneously, the portion of Mr. Meili's compensation that would have gone to Mr. Fagan as a fee should be retained by the plaintiff class. The District Court agreed.

(q) The single most important representation of the class in a formal proceeding was my successful effort to persuade the District Court to accept the settlement as fair pursuant to Rule 23(e). As described above, it was first necessary to renegotiate crucial provisions of the settlement agreement dealing with looted art, acceleration of the payment schedule, access to information needed to administer the deposited assets claims process, and an insurance claims program. The most demanding legal task was, however, the development of a theory that would permit the settlement's implementation without an economically and socially ruinous adversary allocation process that appeared to be required under *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999), and *Nat'l Super Spuds, Inc., v. N.Y. Mercantile Exchange,* 660 F.2d 9 (2d Cir. 1986). I developed a settlement implementation process based on a combination of John Rawls and Alfred Hirschman under which the class was assured "exit, loyalty and voice" in return for pre-committing itself to the results of a fair allocation process before knowing what the outcome of the process would be. See John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000). Such a pre-commitment strategy allowed the class to opt for a process, not a particular substantive outcome, by agreeing to be bound by the Court-approved recommendations of a Special Master for Allocation and Distribution, assisted by a single Lead Settlement Counsel with no loyalty to any particular segment of the class, in place of the adversary free-for-all contemplated under *Amchem.* The key to the success of the acceptance of such a pre-commitment strategy as fair was the existence of a qualified Special Master, and a Lead Settlement Counsel who had no pre-settlement economic stake in the acceptance of the settlement as fair, and who was prepared to carry out the post-settlement duties of Lead Settlement Counsel in enforcing the outcome of the fair allocation process without favoring any particular group of class members. Since I had waived pre-settlement fees, I had no economic stake in the settlement's negotiation and acceptance within the meaning of *Amchem*. Moreover, since I was willing to accept the responsibility as Lead Settlement Counsel to assist the class in communicating directly with the Special Master, and the responsibility to enforce the results of the fair claims processes recommended by the Special Master and approved by the Court, it was possible to approve the settlement as fair without the need for multiple adversary counsel for the various components of the class. The District Court accepted my proposed pre-commitment implementation structure and upheld the settlement as fair. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000). The Second Circuit approved the process in *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 149 n. 15 (2d Cir. 2005)(rejecting Mr. Dubbin's assault on the process and characterizing the behavior of the District Court, the Special Master and Lead Settlement Counsel as "exemplary").

(i) Unfortunately, neither Mr. Swift, nor Mr. Dubbin appear to understand two crucial aspects of my role as Lead Settlement Counsel under the pre-commitment strategy adopted by the class at the fairness hearing. First, it was crucial under *Amchem* to assure that at the time I recommended acceptance of the settlement to the District Court as fair, I was free from any economic motive to support the settlement. The existence of a significant potential fee of $10 million for pre-settlement work would have provided exactly the economic motive for me to seek acceptance of the settlement regardless of its intrinsic fairness that would have imperilled the pre-commitment strategy, and might well have doomed the settlement. However, no such requirement attaches to my eligibility for lodestar hourly fees for post-settlement work because my entitlement to hourly fees for work actually performed was not contingent on the court's acceptance of any particular outcome. That is why it was necessary for me to stress my *pro bono* pre-settlement status. The spiteful efforts of Mr Swift ad Mr. Dubbin to turn those necessary representations into a form of estoppel precluding an award of post-settlement fees demonstrates that neither has an understanding of why the representations were necessary.

(ii) The second crucial aspect of my role as Lead Settlement Counsel under a pre-commitment strategy that appears to baffle Mr. Dubbin and his clients, and that Mr. Swift simply refuses to acknowledge, is my duty to enforce the results of the fair allocation process as long as they are lawful, even when I personally disagree with the results. The class would have torn itself apart if every dispute over allocation became a matter for expensive litigation. Instead, the pre-commitment strategy bound the class to respect the results of a fair allocation process even when those results disappointed class members. My duty as Lead Settlement Counsel was to enforce the results of the fair allocation process as long as they fell within the bounds of law. Only Mr. Dubbin's continuing obtuseness can translate the performance of my duty to the class as a whole to defend and enforce the lawful results of the fair allocation process into a "betrayal" of his small group of clients who believed that too much money was being allocated to destitute Holocaust survivors in the former Soviet Union, and not enough to less needy Holocaust survivors residing in South Florida and elsewhere in the richest nation on earth.

(r) In summary, among the specific legal tasks that I have performed are: (1) defending the basic structure of the settlement at two Fairness Hearings held on November 29, 1999 in Brooklyn, and December 14, 1999 in Jerusalem (by telephone), ultimately resulting in the issuance of an opinion and order by the District Court dated July 26, 2000, and August 9, 2000, respectively, upholding the settlement's fairness;[17] (2) defending the Special Master's Proposed Plan of Allocation and Distribution at a hearing held on November 20, 2000, resulting in an opinion and two orders dated November 22, 2000 and December 8, 2000, respectively, upholding the plan of allocation and directing its implementation;[18] (3) opposing intervention and challenges to the settlement structure by multiple objectors at a hearing held on November 22, 1999; (4) defending multiple appeals to the Second Circuit from various orders rejecting challenges to the settlement in the District Court, including the preparation and filing of plenary appellate briefs defending: (a) the definition of the plaintiff classes,[19] (b) the allocation plan,[20] (c) the *cy pres*

[17]The District Court's fairness opinion upholding the settlement under Rule 23(e) is reported at *In re Holocaust Victim Assets Litigation*, 105 F. Supp.2d 139 (E.D.N.Y. 2000).

[18]The District Court's opinion upholding the Special Master's Proposed Plan of Allocation and Distribution is reported at *In re Holocaust Victim Assets Litigation*, 2000 U.S. Dist. LEXIS 20817 (EDNY November 22, 2000).

[19]The Second Circuit opinion upholding the definition of the plaintiff-classes is reported at *In re Holocaust Victim Assets Litigation*, 225 F.3d 191 (2nd Cir. 2000).

[20]The Second Circuit first opinion upholding the Special Master's Proposed Plan of Allocation and Distribution is reported at *In re Holocaust Victim Assets Litigation*, 413 F.3d 183 (2nd Cir. 2001). The Circuit' subsequent three opinions opinion rejecting challenges to the *cy pres* allocation formula are reported at *In re Holocaust Victim Assets Litigation*, 424 F.3d 132, 158, and 170 (2nd Cir. 2005).

administration of the looted assets class,[21] (d) the scope of the slave labor II class;[22] and (e) denial of attorneys fees to counsel for an objector;[23] (5) delivering seven oral arguments in the Second Circuit; (6) receiving seven Second Circuit opinions upholding the definition of the plaintiff-class, upholding the allocation plan, dismissing the appeal from the Court's requirement of self-identification by prospective slave labor II releasees, upholding the *cy pres* allocation formula; and affirming the District Court's fee denial; (7) engaging in extensive appellate motion practice and negotiation resulting in the withdrawal or dismissal of five appeals,[24] (8) prosecuting three collateral proceedings before Judge Block involving the scope of the slave labor II class, the interest rate on funds held in the Escrow Fund,[25] and access to data in possession of the defendant banks; and (9) reviewing claims for attorneys' fees, and making recommendations to the Court concerning the appropriate fee structure;[26]

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[21] Id.

[22] The Second Circuit opinion dismissing the appeal from the District Court's requirement of self-identification as a precondition for a Slave Labor II release, and remanding for additional exploration of the parties' intentions concerning the Slave labor II status of after-acquired companies is reported at *In re Holocaust Victim Assets Litigation*, 283 F.3d 103 (2nd Cir. 2002).

[23] See *In re Holocaust Victim Assets Litigation*, 424 F3d 150 (2nd Cir. 2005).

[24] See, eg, *In re Holocaust Victims Assets Litigation*, 2000 U.S. App. LEXIS 29529 (2nd Cir. November 20, 2000)(dismissing appeal for failure to comply with calendar rules).

[25] *In re Holocaust Victim Assets Litig.* 256 F. Supp.2d 150 (EDNY 2003).

[26] See In re Holocaust Victims Assets Litigation, 2002 U.S. Dist. LEXIS 20195 (E.D.N.Y. October 23, 2002)(denying risk multiplier). The dismissed or withdrawn appeals include a challenge by Sinti-Roma objectors to the allocation plan (Ramsey Clark); a challenge by United States' survivors to the allocation plan (Dubbin/Weiss); a challenge to the use of *cy pres* in connection with the Looted Assets class (Katz Estate); a challenge by disabled survivors to the notice plan (Wolinsky); and a challenge to the qualifications of class counsel

The legal issues raised by the challenges in the District Court and the Second Circuit appeals were extremely difficult because of the unprecedented scope of the settlement, and the commitment of both the Court and counsel to a settlement structure that minimized the traditional use of adversary process in order to avoid pitting elderly survivors against each other as adversaries at the close of their lives. The approach was excellent social policy, but required an intensive legal defense. Excerpts from my contemporary time records reflecting the time expended on my legal representation of the class in connection with litigated matters are set forth as Exhibit C.

C. Providing Ongoing Legal Advice and Counsel

As the Court has noted, since the signing of the settlement agreement, I have functioned as *de facto* general counsel to the settlement process. In the seven years since February 1, 1999, I have provided legal advice to the Court, to the Special Masters, and to the institutions administering the claims programs on a vast array of issues ranging from Swiss privacy law, to the wording of releases, to the law of presumptions, to theories of valuation, to the myriad of issues that have arisen in an attempt to implement Amendments 2 and 3 to the settlement agreement. Scarcely a day goes by without an issue of law arising that requires attention. For example, at the time of the drafting of this paragraph, I was engaged in dealing with (1) a Canadian search firm concerning its refusal to disclose the identities of its clients; (2) Price Waterhouse and UBS concerning access to the TAD archive in UBS; (3) ICHEIC, the German Foundation and Swiss Life concerning the Swiss insurance program; (4) lawyers for the State of Israel concerning

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in the income tax area(Dunaevsky).

potential residual distributions; (5) ICHEIC concerning the relationship between its humanitarian fund and allocation issues in this case; (6) CRT II concerning potential revaluations of certain awards, and access to the TAD; (7) Credit Suisse concerning improved voluntary cooperation; (8) Swiss banking authorities concerning the refusal to permit transmission of certain data to the New York City claims facility; (9) review of the compensation of vendors; (9) review of the investment portfolio and legal issues raised by the potential distribution of residual funds; and (10) the fate of files abandoned by Edward Fagan that may contain unsubmitted claims material. Excerpts from my time records set forth in Exhibit C illustrate the breadth and magnitude of the advisory responsibility

D. Advice and Communication with Class Members

In the seven years since February 1, 1999, I have assisted literally hundreds of members of the settlement classes in understanding the settlement, filing claims, raising concerns with the Special Masters, and communicating with the Court. For an extended period, I spoke by conference call each month with a group of survivor leaders in an effort to keep them informed of the issues raised during the settlement's administration. I have also expended substantial time in drafting interim reports to the community permitting interested persons to assess the progress of the settlement's implementation and to raise informed questions concerning the issues raised by its implementation.

E. Supervising the Notice Programs

From February 1, 1999-May 1, 1999, with the invaluable assistance of Morris Ratner, I oversaw the establishment and successful implementation of an unprecedented worldwide notice program, and the preparation and distribution of more than one million questionnaires directed to members of the plaintiff-classes. 583,000 questionnaires were completed and returned to the Court, demonstrating overwhelming support for the settlement. While much of the work on the notice program was carried out by Morris Ratner, I participated fully in all decisions, and reviewed and edited every aspect of the notice program, including the long form and short form means of communicating with members of the plaintiff class, and the questionnaire. Once the notice materials were completed, I addressed large gatherings of Holocaust survivors in New York City, Westchester, New Jersey, Chicago, Los Angeles, Jerusalem, Tel Aviv, and Palermo, Italy,[27] explaining the nature of the settlement and the mechanism for filing claims. I prepared written materials describing the settlement, and arranged for their distribution to institutions serving large numbers of potential claimants. I carried out closed-circuit television briefings of community leaders in virtually every American city with a significant survivor population, explaining the terms of the settlement to them and providing guidance on the completion of claim forms and questionnaires. Finally, in a series of four lectures, I trained 100 law students at NYU to assist homebound survivors in completing the necessary claim forms. I prepared videotaped versions of my training lectures for use by law students at several law schools in cities with large survivor populations. In connection with the supplemental publication of 3,100 additional names of potential bank account holders on January 12, 2005, I reviewed the proposed notice plan, participated in its revision, drafted necessary press materials and participated in a series of press conferences designed to inform class members of the additional opportunity to file bank account

[27]I accepted an invitation from the Palermo Jewish community to lecture on the Holocaust cases at the University of Palermo on June 5, 2000. I do not seek fees in connection with the lecture. My travel and lodging expenses were paid by the University of Palermo.

claims. Excerpts of my contemporary time records reflecting the time expended on the notice program and the training of persons to assist victims are set forth as Exhibit C.

F. Development of the Settlement's Administrative Structure

During February, March and April, 1999, I participated in a series of discussions with co-counsel, especially Mel Weiss and Michael Hausfeld, on the structure of the settlement process. The discussions culminated in the decision to adopt a bifurcated settlement process, permitting the settlement classes to approve the fundamental fairness of the $1.25 billion settlement and the contours of the five plaintiff-classes prior to the adoption of a detailed plan of allocation and distribution to be proposed by a neutral Special Master. Given the unique nature of this class action settlement, there were almost no precedents to guide us in developing a fair and practicable settlement structure. The structure adopted minimized the use of adversary process between and among the five settlement classes in connection with the development of an allocation plan in order to avoid pitting categories of survivors against each other in a struggle for limited funds. Instead, class counsel recommended a more collegial settlement process, pursuant to which the members of the plaintiff classes were provided with "exit, loyalty and voice" in connection with the development of an allocation plan. Pursuant to the plan, all settlement counsel were expected to assist any class member in approaching the Special Master, the Special Master was expected to function as a neutral arbiter in proposing a just allocation plan, the proposed allocation plan was to undergo scrutiny by the members of the plaintiff-classes, who would then be free to challenge any aspect of the plan before the District Court. Class members who were dissatisfied with the procedures for establishing an allocation plan were free to opt out of the settlement. However, once a member of the plaintiff-class agreed to the procedures by declining to opt out, the class member would be bound by the results of the final allocation plan adopted by the District Court, and would not have a second opportunity to opt out. In effect, class members were asked to pre-commit to the outcome of a fair process, as opposed to demanding a particular substantive outcome. Given the lack of precedent, and the substantial sums involved, I expended a great deal of time in researching and thinking through a settlement implementation structure that was unorthodox, but that appeared to fit the needs of the class more closely that a traditional adversary process. The plan was overwhelmingly endorsed by the plaintiff classes, and provided an innovative framework for carrying out the settlement without embittering the lives of many survivors by forcing them to act in an adversary mode against other survivors. Most importantly, the structure has worked, providing a practicable framework for the distribution of $800 million to date to 300,000 Holocaust victims or their heirs throughout the work. Excerpts from my contemporary time records reflecting the time expended in developing the settlement's structure are set forth as Exhibit C.

G. Securing a Federal Income Tax Exemption

Beginning in February, 2000 and culminating in early June, 2001, together with Mel Weiss, I worked to secure an exemption from federal income taxes on the $180 million in interest income earned by the $1.25 billion settlement fund to date, and for all distributions to beneficiaries. I drafted several proposed statutes and repeatedly discussed the issue with the staffs of numerous members of Congress. I worked closely with the staff of Senators Fitzgerald (Rep-Ill) and Schumer (D-NY) in preparing both legal and policy memoranda on the merits of federal income tax exemption for the settlement fund. I traveled to Washington, D.C. on several occasions to brief Congressional staffers. Despite my vigorous efforts, however, my efforts would not have been successful were it not for the extraordinary efforts of Mel Weiss, who was ultimately successful in persuading the leadership of both the Democratic and Republican Parties to support the tax exemption. On June 12, 2001, Mr. Weiss persuaded members of Congress engaged in adopting the 2001 budget to adopt a version of the tax exemption for the Swiss bank settlement fund that I had drafted. Moreover, he persuaded Congress to adopt it retroactively, freeing the settlement fund from all federal income tax liability and paving the way for a substantial tax refund of more than $3 million. The exemption from federal income taxation for the $180 million in interest earned to date by a $1.25 billion fund provides an ongoing material financial benefit to the plaintiff classes valued conservatively at a minimum of $25 million, and an income tax benefit to recipients of at least $50 million.

I recommend that Mr. Weiss, who has waived pre-settlement fees for his efforts in achieving the settlement, be awarded an appropriate fee of $1.5 million in recognition of his extremely valuable post-settlement services to the class in persuading Congress to award tax exempt status to the settlement fund. Mr. Weiss has indicated that he wishes any such fee to be donated in equal shares to the Foundation for Righteous Gentiles, and the Public Interest Loan Forgiveness Fund at New York University Law School, enabling graduates who work at relatively low-paying jobs serving the public interest to have a percentage of their student loans forgiven for each year that they devote to such relatively low-paying, but socially important, legal practice. Mr. Weiss has stipulated that preference in receiving the loan forgiveness funds be given to descendants of Holocaust victims, or to persons engaged in assisting Holocaust victims.[28]

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[28]In view of the enormous economic value to the class of the income tax exemption achieved by Mr. Weiss, with my assistance, and in view of the fact that he wishes to donate his fees to

Excerpts from my contemporary time records reflecting time expended on seeking tax exempt status for the settlement fund are set forth in Exhibit C.

H. Monitoring the Administration of the Settlement

Throughout my tenure as Lead Settlement Counsel, but with increasing intensity since July, 2001, I have monitored the administration of the settlement to assure the proper and efficient distribution of funds to eligible recipients. Although I do not have primary responsibility for the supervision of the claims processes involving the five plaintiff classes, I have regularly reviewed the standards and practices associated with the processing of claims by members of the deposited assets class, the slave labor I and II classes, the refugee class, and the looted assets class. I have engaged in intensive discussions with interested parties over the fairness of various rules governing allocation and distribution, especially the evidentiary rules and presumptions governing the CRT II deposited assets claims process, and the modest insurance claims process, and have expended substantial time assisting individual claimants in filing appropriate claims with the appropriate claims program. During July and August 2001, I arranged for the transfer of the settlement fund's assets from the Credit Suisse Escrow Fund to accounts under the exclusive direction and control of the class and the District Court at Citibank and HSBC. Following the transfer of funds, I expended substantial time in assuring that the Swiss banks pay appropriate interest on deposited funds. I expended substantial time in contingency planning for a possible secondary distribution in the event that CRT II is unable to identify the owners of a portion of the

Holocaust-related charities, I suggest to the Court that it is not necessary to subject Mr. Weiss's request to a "green eyeshade" test similar to the assault on my application. No reason exists to delay the payment of the funds to worthy Holocaust-related charities.

$800 million set aside for the deposited assets class. I have successfully sought to foster collaborative efforts between the Swiss bank settlement fund and the German Foundation “Remembrance, Responsibility and the Future” to minimize administrative costs. With the assistance of Deborah Sturman and Melvyn Weiss, I review and approve all distributions from the settlement fund before signing an authorization for the transfer of funds. Finally, in close consultation with the Court, I monitor the investment strategy of the settlement fund, and, with the benefit of advice from the settlement fund’s financial advisors, I participate in decisions to alter the fund’s investment strategy in an effort to maximize return with minimal risk to the fund. Perhaps most importantly, on behalf of the settlement classes, I monitor those groups investigating the past to gain a greater understanding of the Holocaust. For example, I closely monitored the findings of the Volcker Committee and the Bergier Commission, and sought to convey those finding to the general public. Conversely, when Holocaust deniers or minimizers, such as Norman Finkelstein, seek to minimize the horrors of the Holocaust, I seek to rebut them. Finally, I play a significant role in the appeals processes in connection with the refugee class, the two slave labor classes, and the deposited assets class. I helped to develop the appeals processes and will make recommendations to the Court in connection with each appeal. Excerpts from my contemporary time records reflecting time expended on monitoring the settlement and planning for a possible secondary distribution are set forth as Exhibit C.

I. Defending the Settlement in the Public Arena

Throughout my tenure as Lead Settlement Counsel, I have defended the settlement from attacks by critics, and by Holocaust deniers and minimizers of various stripes. I have engaged in intensive discussions with many objectors and potential objectors, persuading many of the principal objectors to withdraw their appeals and objections in the interest of solidarity with the victims, and dissuading many others from filing any objections at all. In addition, appellate motion practice and vigorous discussions caused the withdrawal of several other appeals prior to the briefing stage. I have written widely in defense of the settlement in an effort to assure that the historical record accurately reflects the scope of Holocaust-related suffering. Excerpts from my contemporary time records reflecting time expended on public defense of the settlement agreement against attacks from critics who seek to characterize it as blackmail, and in publicly defending and disseminating the factual determinations and legal conclusions concerning Swiss behavior during WW II upon which the settlement agreement is premised, are annexed as Exhibit C.

Part II: Prior Behavior Placing Objections to this Application in Context

______13. The prior behavior of Messrs. Dubbin and Swift in this case call their motives for opposing this application into serious question. While questionable motives and past questionable behavior do not preclude any objector from raising appropriate legal objections to this application, past behavior is relevant to the resolution of issues of credibility, and places these objections in context.

A. Mr. Dubbin's Prior Activities in the Litigation

1. Mr. Dubbin's behavior in this case has been genuinely appalling. He has engaged in "blackmail" and "extortionate activities" aimed at the class (*In re Holocaust Victim Assets Litig.*311 F. Supp.2d at 375); has attempted to bilk the class of $5.9 million in unwarranted legal fees without providing any benefit to the class (*In re Holocaust Victim Assets Litig.*302 F. Supp.2d at 118); has propounded baseless objections to the distribution plan designed merely to support a fee application (*In re Holocaust Victim Assets Litig*, 424 F.3d 132; 150); and, has blatantly lied about the date Lead Settlement Counsel learned of HSF's existence in a disgraceful effort to attack his integrity.[29]

2. In 1999, Mr. Dubbin participated in what Chief Judge Korman described as "blackmail" and "extortion" in seeking a payment from the class to his client, a Miami doctor, as the *quid pro*

[29]As described below, Mr. Dubbin attempted to question the integrity of Lead Settlement Counsel's contemporaneous time charges by claiming under oath that one entry, on February 28, 2001, billed time to "issues in HSF appeal" before the existence of HSF was made known to the Court. In fact, Mr. Dubbin was fully aware that HSF had been made known to the Court and to counsel as early as November 16, 2000 in a letter and declaration filed by Leo Rechter and Joe Sachs. Indeed, Mr. Dubbin had repeatedly cited those documents in support of motions that he subsequently filed with the Court describing the HSF organization, which he had founded.

quo for the withdrawal of a challenge to the settlement's fairness. (*In re Holocaust Victim Assets Litig.*311 F. Supp.2d at 375) The issue was important because the pending challenge blocked the settlement's ability to distribute funds to poor survivors until its resolution by the Second Circuit. I had no doubt that the challenge would lose, but it was holding up distribution. Chief Judge Korman, in a formal opinion, described the effort to extort money from the class as "beyond the pale."

3. Mr. Dubbin and his client then filed a grotesque application for $5.9 million in attorneys' fees from the class. I opposed it vigorously. Chief Judge Korman denied the subsequently reduced fee application in its entirety, finding that Mr. Dubbin's activities were "worthless." *In re Holocaust Victim Assets Litig.* 302 F. Supp.2d at 118. The Second Circuit affirmed. *In re Holocaust Victim Assets Litig.*, 424 F.3d 150 (2nd Cir. 2005).

4. Finally, Mr. Dubbin, acting on behalf of a small group of Miami survivors, argued that too much Holocaust settlement money was being allocated to destitute survivors in the former Soviet Union, and not enough to survivors in South Florida. Chief Judge Korman rejected the challenge, ruling that the $205 million in settlement funds allocated to the poor should go to those survivors who needed the help most. The Second Circuit affirmed. *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. 2005).

5. At Mr. Dubbin's request, in 2005, the Second Circuit exhaustively reviewed each of Chief Judge Korman's orders, resoundingly upheld the Court's "withering" view of the worth of Mr. Dubbin's activities, praised Judge Korman's efforts to allocate the funds to the most needy, and characterized my conduct as Lead Settlement Counsel as "exemplary." See *In re Holocaust Victim Assets Litig.,* 424 F.3d 132 and 150 (2nd Cir. 2005) (two related appeals by Mr. Dubbin

challenging allocation and fees).

6. This challenge to my fee application followed. I believe that Mr. Dubbin's assault on my integrity in this proceeding is directly related to his desire to exact revenge for my successful efforts to prevent him from profiteering at the expense of the settlement fund.

B. Mr. Swift's Prior Activities in the Litigation

As the principal draftsman of the settlement agreement as originally executed on January 26, 1999, Mr. Swift made at least six serious errors, all of which required substantial time to rectify.

1. As initially drafted by Mr. Swift, the settlement agreement made no provision for the recovery of looted art, creating a substantial risk that efforts to recover looted art from Swiss defendants would be inadvertently precluded by the settlement agreement. When the flaw was pointed out to the Court, the Court declined to uphold the settlement unless provisions were added dealing with looted art. As Lead Settlement Counsel, I negotiated a set of provisions dealing with looted art that, while sufficient to secure the approval of the court, were not ideal. Most importantly, damage actions were precluded, and geographical venue restrictions were placed on replevin actions. Had the issue been dealt with during the original negotiations, I believe that it would have been possible to have omitted all litigation concerning art from the preclusive effect of this case. Once a version of the agreement was drafted that provided releases for artwork, however, it was necessary for me to negotiate against the backdrop of an existing disadvantageous agreement, making the final negotiated result less attractive.

2. As initially drafted by Mr. Swift, the settlement agreement made no provision for individualized claims programs in connection with any of the five settlement classes. Most

dramatically, the original settlement agreement was terminally ambiguous concerning the crucial issue of financial responsibility for funding the claims processes. Once again, at the Court's direction, I negotiated a solution that took the form of an acceleration of the payment of the final $334 million installment of the settlement and the pre-payment of interest due on the third installment that generated $22.5 million in additional interest to be used to partially fund the claims programs.

3. As initially drafted by Mr. Swift, the settlement agreement contained no provisions concerning access to information needed to administer an individualized claims program for any of the five settlement classes. When the flaw was pointed out to the District Court, the Court directed me to re-negotiate the provisions. After great difficulty, I was able to negotiate a minimally acceptable plan for publication and information access that provided for the publication of information relating to 21,000 accounts and for the creation of a database of 36,000 accounts against which claims could be matched. In 2004, I successfully negotiated for the publication of 3,100 additional names, plus access to the Total Account Database (TAD) and the creation of a satellite claims facility in New York connected by computer link to the CRT II in Zurich.

4. As initially drafted by Mr. Swift, the settlement agreement provided for releases to the Swiss insurance industry without receiving any consideration for such a release. When the flaw was pointed out to the District Court, I was directed to renegotiate an insurance claims program, and to exclude non-cooperating Swiss insurance companies from any release. I did so.

5. As initially drafted by Mr. Swift, the settlement agreement defined the slave labor II class in incomprehensible terms. Because the consequences of an unlimited slave labor II class were potentially disastrous, I was unable to negotiate my way around this problem. Instead, the

badly drafted language precipitated intense litigation, ultimately resulting in a negotiated resolution favorable to the class. See *In re Holocaust Victim Assets Litig.* 282 F.3d 103 (2d Cir. 2002) (resolved by stipulation on remand before Judge Block).

6. As originally negotiated by Mr. Swift, the Escrow Agreement to the settlement agreement failed to state with precision whether compound or simple interest was payable on funds placed in the Escrow Fund. Since the Escrow Agreement appeared to pay a higher rate of interest than the 3.78% figure negotiated by Mr. Swift for the settlement fund, the parties placed most of the settlement fund into the Escrow Fund, only to learn in March, 2001 that the banks were seeking to exploit the ambiguity in Mr. Swift's handiwork to pay simple, rather than compound interest. I was forced to litigate the issue and won a judgment against the banks for $5.2 million. *In re Holocaust Victim Assets Litig.* 256 F. Supp.2d 150 (EDNY 2003).[30]

7. Mr. Swift has consistently opposed the Court's decision to treat the settlement fund as the subject of individual legal claims, as opposed to a general fund for the relief of Holocaust survivors. Accordingly, he has consistently opposed the Court's decisions concerning implementation of the settlement agreement. During the summer of 1999, Mr. Swift urged the abandonment of virtually all claims programs in favor of a *pro rata* distribution of the entire settlement fund to each Holocaust survivor without regard to individual legal entitlement. When it

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[30]In an effort to denigrate my success in recovering the $5.2 million in additional interest, Mr. Swift has attempted to characterize the confusion over interest rates payable under the Escrow Agreement that he drafted as a "blunder" attributable to me in connection with negotiating the acceleration provisions in Amendment 2. At the time Amendment 2 was negotiated, however, the banks read the Escrow Agreement as providing for compound interest. There was, therefore, no reason for me to have been concerned with Mr. Swift's poor draftsmanship, which did not emerge as a problem until the banks decided to make an issue of it a year later.

was explained to him that the settlement agreement required an allocation among the five settlement classes and individualized claims processes, especially for bank accounts, Mr. Swift urged that the bulk of the settlement fund be allocated to the looted assets class to be distributed on a *pro rata* basis to Holocaust survivors. Mr. Swift opposed the allocation to the bank account class, despite the strength of the class's legal claims, insisting that more funds be allocated to the looted assets class despite the impossibility of linking particular items of looted property to a Swiss entity in a manner that would justify a legally defensible award. Mr Swift opposed the use of the CRT II as a bank account claims processing mechanism for the deposited assets class despite its expertise in the area, arguing that he could establish a more efficient claims program. Finally, Mr. Swift has demanded that the bank account claims process cease operations immediately despite its ongoing success in returning bank accounts to their true owners.[31]

8. Mr. Swift opposed the use of the Jewish Conference on Material Claims Against Germany (the "Claims Conference") as an administrative arm of the settlement, arguing that a non-Jewish accountant should be hired to review the activities of the Claims Conference, an insensitive comment that precipitated a stern rebuke from the Court. *In re Holocaust Victim Assets Litig.* 270 F. Supp.2d 313, 325-26 (EDNY 2002) (rebuking Mr. Swift). In connection with his inflated fee application, Mr. Swift complained that he was being treated unfairly because he was not Jewish. See *In re Holocaust Victim Assets Litig.* 270 F. Supp.2d 313, 325 (EDNY 2002)

[31]In view of his record in this case, Mr. Swift's complaint that, in my capacity as Lead Settlement Counsel, I failed to delegate work to him is singularly unpersuasive. In fact, a substantial portion of my time as Lead Settlement Counsel has been spent in dealing with deficiencies in documents drafted by Mr. Swift, and in responding to his fundamental objections to the implementation of the settlement in accordance with the orders of the Court.

(rejecting Mr. Swift's contention).

8. Finally, in 2001, Mr. Swift filed a fee petition on his own behalf and on behalf of counsel who had worked with him seeking $12 million in pre-settlement fees based upon a risk multiplier of 2.29%. I opposed the use of a risk multiplier in a case where several competent lawyers were available to prosecute the pre-settlement aspects of the litigation without fee. As the District Court noted, Mr. Swift responded to my opposition to a risk multiplier with an inexplicable personal attack on me characterized by the Court as "frivolous and pointless." 270 F. Supp2d at 325. The District Court accepted my analysis and awarded lodestar hourly fees without a risk multiplier. *In re Holocaust Victim Assets Litig.* 270 F. Supp.2d 133 (EDNY 2002). The fact is that Mr. Swift has never forgiven me for my argument that the existence of *pro bono* lawyers willing to perform pre-settlement work without fee rendered his application for a substantial risk multiplier inappropriate. Since I was one of those *pro bono* lawyers, I believe that he is using this proceeding to punish me by seeking to use my pre-settlement willingness to work *pro bono* as a spurious basis for denying me post-settlement fees.[32]

C. The Prior Position of Certain Objectors Concerning Fees for Mr Dubbin

Class members are, of course, entitled to challenge this fee application. Moreover, as Holocaust survivors their views are entitled to attention and respect. It is appropriate, however, to point out inconsistencies in the approach of certain objectors on the issue of fees.

[32] As discussed below, Mr. Swift misleadingly claims that he offered to perform post-settlement work pro bono. He omits to mention that the offer was in the context of his $12 million fee application that was rejected by the Court, and that it arose out of his unwillingness to file additional lodestar records for what he characterized as "modest" time expended.. Mr. Swift never repeated his alleged offer to work *pro bono* after being limited to lodestar fees.

1. Mr Leo Rechter, a Holocaust survivor leader whose work is entitled to great respect, has been quoted as opposing an award of fees to me for my seven years of service as Lead Settlement Counsel because the Swiss bank settlement is "holy money" that should go to survivors, and not to lawyers. However, on March 18, 2002, Mr. Rechter wrote to the Court supporting the original fee application of Samuel Dubbin seeking $5.9 million, a fee application subsequently found by the Court to have been wholly unjustified. (JA 6430).[33] Moreover, on April 24, 2004, Mr. Rechter wrote to the District Court supporting the amended fee application of Mr. Dubbin even after the Court had deemed it unjustified On both occasions Mr. Rechter supported a fee award for Mr. Dubbin because Mr. Dubbin was urging an allocation for United States survivors with which Mr. Rechter agreed. With respect, Mr. Rechter's position is, apparently, that lawyers with whom he agrees should receive payments from the settlement fund, even when the Court deems the work to have been worthless; but Lead Settlement Counsel is not entitled to compensation for his seven years of work because Mr. Rechter disagrees with the allocation of funds to destitute survivors in the former Soviet Union that it was Lead Settlement Counsel's duty to defend.

2. Mr. David Mermelstein, Mr. Alex Moskovic, and a number of their colleagues residing in South Florida associated with Mr. Dubbin's HSF organization, have been quoted as criticizing me for seeking a fee in this proceeding for seven years of work as Lead Settlement Counsel equal to 7% of the sum that my efforts have added to the value of settlement fund. However, in September, 2005, Mr Mermelstein, Mr. Moskovic and his colleagues supported a fee award to Mr.

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[33]JA citations are to the Joint Appendix filed with the Second Circuit in connection with Mr. Dubbin's unsuccessful appeals in *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 and 150 (2d Cir. 2005). Lead Settlement Counsel's copy of the Joint Appendix will be made available to the Court. Mr. Dubbin and Mr. Swift participated in the appeals and have access to their own copies.

Dubbin and his colleagues in connection with the Hungarian Gold Train case of 14% of the total recovery for Holocaust survivors. The allocation of funds in the Hungarian Gold Train case favored survivors residing in the United States at the expense of destitute survivors residing in Hungary. Thus, Mr. Mermelstein and his colleagues supported a 14% award to counsel as long as survivors in South Florida were to receive a disproportionate amount of the settlement funds allocated to the poor, but oppose fees for Lead Settlement Counsel's seven years of work that are less than one-half the 14% figure solely because Lead Settlement Counsel defended an allocation ordered by the Court that favored destitute survivors residing in the former Soviet Union at the expense of less desperate survivors residing in the United States.

3. Indeed, in this case, survivors residing in South Florida associated with HSF have consistently urged that fees be paid to Mr. Dubbin solely on the ground that he was seeking more funds for survivors residing in the United States. See, eg., HSF letter to Court dated November 18, 2002, supporting an award of fees to Mr. Dubbin (JA 8849); letter of Alex Moskovic to Court dated March 30, 2004, supporting award of fees to Mr. Dubbin (JA 7982); Letter from Mr. Schaecter to Court supporting award of fees to Mr. Dubbin and criticizing Lead Settlement Counsel for defending allocation ordered by the Court)(JA 7973).

4. I do not take offense at the inconsistency displayed by Mr Rechter and by Mr. Mermelstein and his HSF colleagues because I respect them as survivors, and believe them be motivated by a genuine desire to help needy survivors residing in the United States. Their objections are not, however, a reasoned basis on which to deny Lead Settlement Counsel compensation for seven years of service to the settlement classes because they are so obviously linked to anger at Lead Settlement Counsel's performance of his duty to defend the Court's

allocation decisions.

5. Finally, as described more fully below, there is absolutely no basis for an assertion that I misled any member of the class into believing that my post-settlement work was uncompensated. I never made any such statement to a survivor, or to anyone else. Whatever discussion there may have been about *pro bono* work always related to my having waived fees for my pre-settlement work.

Part III: The Facts Refuting Each Objection Proffered by Mr Dubbin and Mr. Swift

14. Objectors raise three sets of objections to this application. First, they argue that the class has received inadequate notice of the fee application. Second, they challenge the eligibility of Lead Settlement Counsel for an award of post-settlement fees, arguing (a) that he is estopped because he agreed to waive fees for his pre-settlement work; and (b) that the settlement fund may not be asked to pay for his work representing the Court, as opposed to the class. Finally, objectors challenge the calculation of the proposed fee, contesting the assertion that Lead Settlement Counsel's efforts increased the fund by at least $50 million, challenging Lead Settlement Counsel's lodestar rate of $700 per hour, and impugning the accuracy and reliability of his contemporaneous time records. Each objection interposed to this application is refuted by the following facts:

A. Objections to Notice

______(1) Objectors assert that notice is deficient under Rule 23(h)(1). Even if one assumes that Rule 23(h) is applicable to an application for post-settlement hourly lodestar fees for work performed by Court-designated Lead Settlement Counsel at the request of the supervising

District Judge, and even if one assumes that the notice to the class in May, 1999, informing the class that counsel fees might reach $22.5 million is insufficient, "reasonable" notice to the class of this fee application within the meaning of Rule 23(h)(1) unquestionably has been given.

(2) Although Lead Settlement Counsel's original supporting declaration was completed on November 1, 2005, the press of business forced Lead Settlement Counsel to delay its production and filing until December 19, 2005. Settlement counsel were served with copies of the fee application on December 19, 2005, simultaneously with its filing. Shortly thereafter, copies of the fee application were provided to Mr. Dubbin at his request on or about January 3, 2006.

(3) When Messrs. Dubbin and Swift argued that Rule 23(h) required greater notice, the entire fee application was placed on the website maintained by the class, including hundreds of pages of Exhibits that included 164 pages of time records.

(4) In addition to formal notice carried out by service and posting on the case website, widespread press reports of the fee application have appeared in The New York Times, The Associated Press, The Forward, Jewish Week, Jewish Life, Haaretz, The Jerusalem Post, The Wall Street Journal, Israel News Service, MSNBC, NY 1, ABC News (Philadelphia), the Zimbabwe Times, News 24 (South Africa) and New York Newsday. Copies of the press reports are annexed as Exhibit I to this declaration.

(5) The combination of service on settlement counsel, provision to Mr. Dubbin at his request, display on the case website, and widespread reporting by the press unquestionably satisfies any conceivable requirement of "reasonable' notice within the meaning of Rule 23(h). Requiring additional notice costing at least $500,000 at the class's expense would be both

wasteful and unnecessary.

(B) Objections to Eligibility

(1) Objectors contest Lead Settlement Counsel's eligibility for post-settlement fees on two grounds, First they argue that having waived pre-settlement fees of between $5-$10 million for having played a principal role in achieving the $1.25 billion settlement, Lead Settlement Counsel is precluded from seeking post-settlement fees under a theory of judicial estoppel. Second, they argue that fees may not be awarded for time spent defending the allocation decisions of the Court from attack by a small, disgruntled segment of the class represented by Mr. Dubbin. Neither objection is defensible.

No Grounds for Estoppel Exist

(2) I began work on this case almost 10 years ago in December, 1996, at the behest of a group of lawyers headed by Robert Swift and Edward Fagan, who asked me to attend a hearing scheduled in this Court for January, 1997, and to advise them on remedial options. I now realize that my principal attraction to the Swift/Fagan team was the fact that I had successfully argued several constitutional cases before this Court, rendering it more likely that the Court would select the Swift/Fagan team to serve as lead plaintiffs' counsel, as opposed to a rival slate headed by Melvyn Weiss and Michael Hausfeld,.

(3) When I attended the hearing in January, 1997, the Court noted my presence in the courtroom and asked if I were affiliated with any of the lawyers seeking lead counsel status. I informed the Court that while I was informally associated with the Swift/Fagan team, my loyalties were with the plaintiffs generally, and that I was prepared to assist any counsel. At that point, the Court urged the competing lawyers to appoint me as co-counsel for all plaintiffs, and requested

me to attempt to form a plaintiffs' Executive Committee to prosecute this litigation. I accepted the responsibility.

(4) My initial instinct was to form a 9 person Executive committee, with 4 seats for each of the competing slates of lawyers, and the 9th seat held by me. I rejected that option, however, because I feared that the two sides would constantly deadlock, forcing me to break ties repeatedly. Instead, I recommended a 10 person committee, with the Swift/Fagan team holding 4 seats, the Weiss/Hausfeld team holding 5 seats, and the 10th seat held by me. Once the Executive Committee was formed, I informed my co-counsel that unless each slate cooperated with the other, I would use my 10th vote to deadlock the case. Once both slates realized that it was impossible to dominate the other, both slates cooperated fully in prosecuting the litigation effectively. Messrs. Swift and Hausfeld were designated co-chairs. Mel Weiss served as liaison counsel and as chair of the negotiations sub-committee. I chaired the law sub-committee.

(5) At the first meeting of the newly-formed plaintiffs' Executive Committee held at New York University School of Law in February, 1997, I informed my co-counsel that for deeply personal reasons, I did not intend to seek fees for my work in prosecuting the action. I opposed Mr. Weiss's argument that all counsel should serve without fee. Instead, I urged those counsel who wished to seek fees to treat this case as though it were governed by 42 U.S.C. 1988, warranting hourly lodestar fees for work that advanced the interests of the plaintiff class.[34] All counsel agreed, with the exception of Mr. Swift who remained silent, and who, in connection with his fee application in this case, denied that such a decision had been taken by the Executive

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[34] I have maintained that position for 10 years, and have applied those standards to this fee application.

Committee.

(6) When the defendant banks filed omnibus motions to dismiss totaling more than 2,200 pages of material, I began the task of seeking to respond. It quickly became apparent to me that a combination of ego and analytical weakness was rendering it difficult to produce responsive papers of high quality on behalf of the full plaintiffs' Executive Committee. Accordingly, I made my research and memoranda available to the Executive Committee, but, with the Executive Committee's consent, on June 17, 1997, I filed a separate response to the defendants' motions setting forth the legal theory underlying plaintiffs' various causes of action, including a novel constructive trust theory that materially enhanced the power of plaintiffs' claims concerning bank accounts. A copy of my responsive Memorandum of Law is annexed as Exhibit F. At the Court's suggestion, on July 31, 1997, I drafted and filed four interlocking amended complaints clarifying plaintiffs' several claims, and curing a series of technical defects present in the complaints as initially drafted that might have caused the dismissal of the litigation. On August 1, 1997, I led plaintiffs' counsel in eight hours of oral argument before the Court in opposition to defendants' motions to dismiss.[35]

(7) During the ensuing year, I participated in the negotiations held under the auspices of Stuart Eizenstat, and authored an influential New York Times Op Ed explaining why the banks' mid-year settlement offer of $600 million was inadequate. I testified before the Senate Banking Committee, conferred with numerous local officials with the power to influence the banks'

[35] My first genuinely unpleasant exchange with Mr. Swift in this case took place the next day when, at a post-argument meeting of the Executive Committee, Mr. Swift vigorously attacked me for filing the amended complaints at the Court's invitation, and for playing too large a role at the oral argument. I told him that I was tired of carrying him and threatened to resign from the case. Cooler heads prevailed, and the Executive Committee dispersed for vacation.

behavior, and fostered a working relationship with Paul Volcker. On July 28, 1998, with negotiations stalled at $900 million, I urged the Court to become personally involved in the negotiations. The Court agreed, and after 12 days of intense negotiations in chambers, during which Mel Weiss, Michael Hausfeld and I adamantly insisted on a settlement figure of $1.5 billion, the parties, with the invaluable assistance of the Court, reached an agreement in principle to settle the litigation for $1.25 billion, in return for comprehensive releases precluding further litigation against Swiss entities arising out of the Holocaust.[36]

(8) With the attainment of the $1.25 billion settlement on August 12, 1998, I considered my work on this litigation to be at an end, and withdrew from active participation in the case, transferring my energies to the prosecution of emerging litigation against German companies that had utilized slave labor during WW II. I played no role in the drafting of the settlement agreement as originally executed on January 26, 1999.[37] My understanding is that the original settlement agreement, together with the Escrow Agreement dated November, 1998, were negotiated and drafted primarily by Mr. Swift, with significant input from Mr. Hausfeld.

(9) In late January, 1999, after having been away from the case for five months, I was asked by the Court, as well as by my co-counsel, to serve as a settlement counsel. I was, at that time, extremely reluctant to accept a major responsibility for implementing the settlement,

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[36]Our negotiating position was compromised during the end-game by an unauthorized communication by Mr. Swift and Mr. Fagan to the Swiss banks indicating that an offer of $1.25 billion would be accepted.

[37] I attended one meeting of the Executive Committee during the drafting process to express a free speech concern over provisions in the settlement agreement precluding participants from criticizing the agreement. My concerns were firmly rejected.

strongly preferring to return to my academic pursuits and to my once-flourishing consulting practice.[38] When the Court and my co-counsel earnestly persisted in pressing me to serve, I agreed to serve as a settlement counsel. In March, 1999, once it become apparent that the successful implementation of the settlement required a Lead Settlement Counsel willing and able to provide a highly sophisticated level of legal services over an extended period of time, I reluctantly accepted the Court's invitation to serve as Lead Settlement Counsel. I was appointed Lead Settlement Counsel by the Court on April 1, 2005, after making one last effort to persuade the Court to appoint Messrs. Swift, Hausfeld and Weiss.[39]

(10) I recall a conversation with the Court that took place in March, 1999, during the

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[38]As described below, prior to beginning my work on the Holocaust cases in January, 1997, I had maintained a successful consulting law practice for 25 years. I have represented numerous well-known clients in high-profile settings, including the effort by the Metropolitan Transportation Authority to re-enter the credit markets in the mid-1970's, the challenge by the Long Island Lighting Company to restrictions on its advertising, representation of the Association of National Advertisers, the trade group representing the nation's major corporate advertisers, Cubatobaco, the Cuban tobacco monopoly, and the Wisconsin milk industry. I charged each client a market rate equal to the fees being charged in the New York community by lawyers of equivalent experience, expertise and reputation. Similarly, in my November, 2000 fee submission to the German Foundation arbitrators, I utilized a market rate equivalent to the rate being charged in 2000 by lawyers of equivalent experience and reputation in the New York legal market. Not only did the arbitrators fully accept that market rate, they awarded me a very substantial multiplier for excellence. In 1987, I used prevailing market rates in my fee application to Chief Judge Mishler in connection with my work on the *Margiotta* case. Not once in those years has any client ever suggested a discount because, as an academic, my overhead is quite low.

My consulting practice ceased during the seven years I have served as Lead Settlement Counsel. With the substantial completion of my duties of Lead Settlement Counsel, I have just begun accepting private clients again, and am charging them market rates.

[39]The final exchange of letters in April, 1999 concerning my appointment as Lead Settlement Counsel consisted of a letter from me to the Court urging the appointment of Messers Weiss, Hausfeld and Swift as co-lead settlement counsel, and a responsive letter from Mr. Hausfeld urging me to serve. See letters docketed as Nos. 301 and 302.

discussions over whether I would accept the Court's designation as Lead Settlement Counsel. The Court expressed an understanding of the personal reasons that had led me to waive fees of up to $10 million for having played a significant role in achieving the settlement, and expressed the opinion that such a personal motive would not necessarily require me to refuse hourly lodestar compensation for carrying out the post-settlement duties of Lead Settlement Counsel over an extended period of time. I expressed gratitude for the Court's understanding without carrying the discussion on fees further.[40]

(11) In 2000, in the midst of the grueling negotiations with the banks that ultimately lead to Amendment 2 to the settlement agreement, when Lead Settlement Counsel complained to the Court that the negotiations were imposing a significant burden on him, the Court noted, once again, that it would be appropriate for Lead Settlement Counsel to seek hourly lodestar compensation at an appropriate time.

(12) Later in 2000, in the context of a discussion over the eligibility of Mel Weiss for post-settlement counsel fees that he wished to contribute to charity, the Court noted that it would view activities taking place after August 12, 1998 as qualifying for post-settlement fees. Lead Settlement Counsel explicitly informed the Court at that time that once his duties as Lead Settlement Counsel were successfully concluded, he would request an hourly lodestar award for

[40] I understand that the Court believes that this conversation took place in 2000 in connection with a discussion of the eligibility of Mr. Weiss for post-settlement fees that he wished to contribute to Holocaust-related charities. My recollection is that such a conversation did take place in 2000, but that it echoed an exchange that had initially taken place in March, 1999. Since all agree that such a conversation between the Court and Lead Settlement Counsel took place no later than 2000, it is unnecessary to determine whether a similar conversation took place in 1999.

post-settlement services to the settlement classes. The Court agreed that such an award would be both appropriate and justified.

(13) In November, 2000, following the several conversations with the Court concerning hourly lodestar fees for Lead Settlement Counsel's post-settlement work, Lead Settlement Counsel formally informed Kenneth Feinberg and Nicholas deB Katzenbach, the arbitrators empowered to set fees in connection with the establishment of the $5.2 billion German Foundation, that although I had waived fees for my pre-settlement work in the Swiss bank case, I intended to seek hourly fees for my post-settlement work as Lead Settlement Counsel.[41]

(14) On January 5, 2001, the Court held its first hearing on attorneys' fees, explicitly distinguishing between pre- and post-settlement fees, and explicitly singling out my post-settlement work as appropriate for hourly lodestar calculation. Mr. Swift, who now professes surprise that my post-settlement work has not been *pro bono,* was present at the January 5, 2001

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[41] I have supplied the objectors with the text of my statement to the German Foundation fee arbitrators concerning my intention to seek hourly fees in the Swiss banks case. The arbitrators awarded me DM 10 million ($4.3 million) in recognition of the centrality of my efforts to the creation of the $5.2 billion German Foundation in settlement of the German slave labor cases. The award exceeded my time charges, and included a substantial excellence multiplier.

In placing my fee application in context, the Court should note that my ten years of service to Holocaust victims has played a principal role in assembling more than $7 billion for Holocaust victims in connection with the Swiss banks case and the German slave labor cases. To date, the German Foundation has distributed $4.4 billion to more than one million persons, and the Swiss bank settlement has distributed $800,000 to more than 300,000 persons. While I am being compensated adequately for my services in both cases, the total of my fee applications in the Swiss bank and German slave labor cases is approximately 1/10 of 1% of the funds assembled for distribution to Holocaust victims, and 1/8 of 1% of the funds actually distributed to victims. With reference to the Swiss bank case alone, the requested fee equals 1/4 of 1% of the $1.25 billion settlement fund, and 7% of the $50 million increase in the fund attributable to my services.

hearing, but has, until now, chosen to ignore the transcript. The relevant portions of the transcript provide:

> **"Judge Korman**: "I think we also have to probably divide this up into two parts, what I regard as the pre-settlement and the post-settlement part of the case.
>
> In the post-settlement, we are not so much talking about achieving the result in terms of a settlement of $1.25 billion, but all the legal work that's gone into addressing all of the issues that's come up in the post-settlement process
>
> * * *
>
> At some point we are no longer dealing with achieving the settlement but of dealing with the tremendous problems that have risen in trying to bring the settlement proceeds ultimately to the beneficiaries of the class. *That's included in the tremendous effort and work by Professor Neuborne and Morris Ratner and Debra Sturman.* Those are three who come to mind immediately as having been involved substantially in that part, so what I think—my basic view is that the critical first step in this process has got to be simply deciding with respect to the settlement, who contributed what and who is responsible for what. Tr. January 5, 2001, p.12. Reprinted as JA-5992 in O4-1898(L)(emphasis added).
>
> * * *
>
> I think in a case like this, there really are two distinctly separate issues. In terms of the division of the case into part one and two, it is true that part two does not involve a risk in the sense that we already know what the package is. But it also makes it much easier to determine what the worth of the services in terms off what the outcome was.
>
> What, for example, just to take the appeal from the denial of the motion of the Polish group to intervene, that's a discrete issue that came up. It involved handling an appeal. It involved preparing a brief. It involved arguing an appeal. One can make a judgment on that quite easily.[42] Tr. January 5, 2001, p 30. JA 6001.
>
> * * *
>
> As I said, I think it is easier – the second half of what I call the two-

[42] Lead Settlement Counsel had briefed and successfully argued the appeal being discussed by the Court. See *In re Holocaust Victim Assets Litig.,* 225 F.3d 191 (2d Cir. 2000).

> part case…because it's regular legal work. You know, you did x number of hours on – there's no problem, and I don't necessarily need to get involved in making a judgment about how much is contributed to the end product.
>
> I mean there were hundreds, if not thousands, of hours of legal work that went into the second phase of this litigation. As it happened, it contributed a lot. But it would be called – this is traditional legal work in which evaluating it is not terribly difficult." Tr. January 5, 2001, p.59. JA 6017.

(15) In communicating with the general public, I have made no secret of my intention to seek hourly lodestar compensation for my post-settlement work as Lead Settlement Counsel. In my widely circulated *Interim Report on Holocaust Litigation in United States Courts*, I expressly noted that I would seek hourly fees for post-settlement work implementing the settlement. That report is hardly a secret to anyone in this case. It was published as *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts,* 80 Wash. Univ. Law Q. 795 (2002), a copy of which was mailed to the Court and to all counsel herein. The *Interim Report* was subsequently cited by both the majority and dissent in the Supreme Court in *American Insurance Association v. Garamendi*, 539 U.S. 396, 404, 431, and 440 (2003).[43] In the published and widely

[43]The Report was completed in February, 2002 for delivery before the 2002 Institute for Law and Economic Policy Litigation Conference: Litigation in a Free Society. Illness requiring open heart surgery prevented me from delivering the Report orally, although the paper was made available to the numerous participants in the Conference. The proceedings of the Conference were published in Volume 80, number 3 of the Washington University Law Quarterly. While Mr. Swift sneeringly refers to the Washington University Law Quarterly as the publication of a "third tier" law school, his parochial response betrays his ignorance of the esteem in which Washington University Law School is held a one of the nation's pre-eminent regional law schools, the respected nature of the Institute for Law and Economic Policy, the widespread circulation of the article, and its emergence as one of the central descriptions and defenses of the recent round of Holocaust litigation. Most tellingly, Mr. Swift's contemptuous view of the article's importance was not shared by the Supreme Court. See *American Insurance Association v. Garamendi*, 539 U.S. 396, 404 (Souter, J., writing for the five-Justice majority); *Id* at 431, 440 (Ginsburg, J., writing for the four-Justice dissent) (2003)(each citing the article favorably).

circulated *Interim Report*, I repeated my statements to the Court and to the German Foundation fee arbitrators described above that I would seek hourly fees for implementing the settlement. *See* 80 Wash. Univ. Law Q. at 804 n. 21 ("Hourly payments for post settlement work needed to administer the fund will be sought").

(16) When relevant, in my communications with the Court, I have referred to my having waived fees for pre-settlement work in achieving the settlement to make it clear that I had no economic stake in the allocation of funds under the settlement that might create a conflict with any segment of the class. Thus, in communicating with the Court, I have referred to my *pro bono* work on behalf of the class in achieving the settlement, not only because I was proud of it, but because my *pro bono* status in achieving the settlement was important in avoiding the economic conflict of interest between counsel and a segment of the class that had doomed the complex settlement in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and had concerned the Second Circuit in *National Super Spuds, Inc. v. New York Mercantile Exchange,* 660 F.2d 9 (2d Cir.1981*).* *See In re Holocaust Victim Assets Litigation,* 424 F.3d 150, 156 (2d Cir. 2005). For examples of declarations filed with the Court in which I carefully delineate my *pro bono* service as limited to achieving the settlement, see, eg., Declarations dated February 22, 2002 (Swift fee application; describing my *pro bono* role in achieving the settlement)(JA 6155); April 10, 2002 (opposing the initial Dubbin fee application)(JA 6466); August 22, 2002 (describing compound interest payments, tax benefits and my waiver of fees for achieving the settlement)(JA 6605); November 6, 2002 (description of Fagan fee award)(JA 6677); July 11, 2003 (opposition to amended Dubbin fee request)(JA 6699); October 2, 2003 (letter to Dubbin re role of Lead Settlement Counsel); October 13, 2003 (describing role of lead settlement counsel)(JA 2580);

February 18, 2004 (allocation issues; description of role of lead settlement counsel)(JA 7869); and April 1, 2004 (allocation issues)(JA 8300); August 23, 2004 (Lead Settlement Counsel's Brief in 04-1898 at 14, 49, 59-62).[44]

(17) During the seven years that I have served as Lead Settlement Counsel, I have never represented to the Court, to counsel, to any member of the plaintiff-classes, or to the general public that I was prepared to carry out the grueling duties of Lead Settlement Counsel without fee. Indeed, six of my co-settlement counsel, Messrs. Ratner, Weiss, Hausfeld, Mendelsohn, Shevitz and Levin, have filed declarations attesting that they understood that I would be compensated for my work as Lead Settlement Counsel. The declarations are annexed as Exhibit G. In short, there can be no estoppel, judicial or otherwise, because there was no reliance by the Court, by my co-counsel, or by the members of the class on any representation that my waiver of fees for having assisted in achieving the settlement carried with it a promise that when the Court re-called me to the case five months after the settlement and asked me to carry out the duties of Lead Settlement Counsel for seven years, that I would expend more than 8,000 hours in the service of the

[44] After combing through hundreds of communications with the Court over a seven year period, Messrs. Dubbin and Swift can point to only two that pose an ambiguity. Mr. Dubbin points to a heated exchange in September 2005 between Lead Settlement Counsel and the trial court in the Hungarian Gold Train case in which the trial court defended a fee award to Mr. Dubbin by noting the German Foundation fee award to counsel. The transcript is garbled, but the context clearly demonstrates that Lead Settlement Counsel was questioning Mr. Dubbin's entitlement to market rate fees for pre-settlement work when *pro bono* or sub-market counsel were available. When Mr. Dubbin's colleagues represented that they had, in fact, unsuccessfully sought assistance from available sub-market resources, Lead Settlement Counsel withdrew his fee objection. No issue of post-settlement fees was before the Court, and counsel never intended to state that he was providing seven years of post-settlement representation without charge. The second instance of ambiguity involves a November 5, 1999 declaration seeking approval of the fairness of the Swiss bank settlement and stressing the lack of an economic conflict between Lead Settlement Counsel and the class because Lead Settlement Counsel had waived pre-settlement fees. The context of the declaration makes it clear that counsel was discussing pre-settlement *pro bono* work

settlement without fair compensation. Quite the contrary, the Court explicitly recognized that hourly lodestar compensation would be payable on several occasions, including the January 5, 2001 fee hearing in open court, and I reported my intention to seek hourly fees to the Court, to my co-counsel, to the German Fee arbitrators, and to the general public.

The False Dichotomy Between Representation of the Class and Representation of the Court

(18) Objectors argue that, even if Lead Settlement Counsel is not estopped from receiving post-settlement fees, he is, nevertheless, ineligible for common fund fees in settings where Lead Settlement Counsel was appointed by the Court to provide adversarial defense to the Court's allocation rulings in connection with appeals to the Second Circuit.[45] The objection demonstrates the objectors' confusion concerning the pre-commitment strategy underlying the implementation of the settlement, and the role of Lead Settlement Counsel in carrying out the pre-commitment strategy.

[45]The only instance of such activity identified by objectors involved legal services provided by Lead Settlement Counsel in connection with the defense of the appeal in 04-1898, Mr. Dubbin's challenge to the Court's *cy pres* allocation of looted assets funds. See Order of the Court, dated September 13, 2004 (appointing Lead Settlement Counsel to provide an "adversarial" defense of the Court's allocation rulings). Representation of the class in the other three related appeals in 04-1899, 04-2466 and 04-2511 involved classic defenses of the settlement fund against efforts to obtain funds from it on unjustified grounds. Indeed, most of the work in 04-1898 itself also involved defense of the settlement as a whole against unjustified attacks on its structure by Mr. Dubbin.

As the Court may recall, Lead Settlement Counsel noted that the September 13, 2004 order was unnecessary because Lead Settlement Counsel's duty to enforce the results of the fair allocation process adopted by the class included a duty to defend the Court's discretionary allocation decisions on behalf of the class as a whole in order to assure the success of the pre-commitment strategy, and not as a functionary of the Court. See Letter to Court from Lead Settlement Counsel, dated September 14, 2004 (describing Lead Settlement Counsel's duty to enforce the Court's ruling on behalf of the class as a whole).

(19) As discussed above, a crucial element of the implementation of this complex settlement was a pre-commitment strategy adopted by the class at the fairness hearing in November, 1999, that asked the diverse elements of the five settlement classes and five victim groups residing in five distinct geographical areas to commit themselves in advance to be bound by the outcome of a fair allocation process before knowing the results of the process. Class members unwilling to pre-commit to the results of a fair allocation process under such a "veil of ignorance" about the outcome were given the opportunity to opt out. As the Court may recall, the class overwhelmingly adopted such a pre-commitment strategy, which avoided the economically and socially ruinous spectacle of an over-lawyered, balkanized survivor community fighting prolonged internecine adversary battles over allocation and distribution. The keys to the success of such a pre-commitment strategy are (1) the presence of fair allocation procedures; and (2) an effective enforcement agent prepared to enforce the results of the fair allocation process against disgruntled persons unhappy about the result. To this day, neither Mr. Swift nor Mr. Dubbin appear to understand that one of the most important of the many roles of Lead Settlement Counsel was to act as that enforcement agent.

(20) Thus, as the Court has noted, even in settings where Lead Settlement Counsel personally disagreed with the substantive results of the fair allocation process to which the class had committed itself, as long as the result in question was lawful, Lead Settlement Counsel deemed himself duty bound to enforce it in order to advance the interests of the class as a whole in an effective pre-commitment strategy. Indeed, as the Court has noted in this fee proceeding, among the allocation rulings defended by Lead Settlement Counsel in 2004-2005 in the Second

Circuit were several with which he had disagreed and had argued against in the District Court. However, having urged members of the settlement classes to agree to respect the lawful outcomes of the allocation and distribution process even when they disagreed with the substantive outcome, Lead Settlement counsel could hardly pick and choose what outcomes to defend. As long as the outcomes were lawful, it was the duty of Lead Settlement Counsel to defend and enforce them in order to preserve the integrity of the pre-commitment strategy on which he settlement's implementation depends.

(21) Given the importance of the success of the pre-commitment strategy to the class as a whole, when Lead Settlement Counsel defended the lawful outcome of the allocation process in the Second Circuit, he was acting as an agent of the class as a whole, and not solely as a functionary of the Court. It was clearly in the interest of the class as a whole for Lead Settlement Counsel to enforce the lawful allocation rulings of the Court. Otherwise the pre-commitment strategy underlying the orderly allocation process would have fallen apart and the settlement would have degenerated into a series of adversary litigations pitting categories of survivors against each other with economically and socially ruinous consequences for all. Since his duty is to the class, as Lead Settlement Counsel informed the Court, had Lead Settlement Counsel believed that the allocation rulings were unlawful, it would have been his duty to oppose them, regardless of any appointment order by the Court.

(22) Accordingly, objectors seek to erect a false dichotomy between representing the interests of the class as a whole, and defending the lawful allocation orders of the Court. From the standpoint of the class, there simply is no meaningful difference between representing the

interests of the class as a whole in the orderly maintenance of the pre-commitment strategy, and defending the results of the fair allocation process that the class has empowered to make binding determinations concerning allocation and distribution.

C. Objections to the Calculation of Lead Settlement Counsel's Fee

(1) Lead Settlement Counsel has submitted an interim application for $5,731,900 in attorneys fees for the period from February 1, 1999-September 30, 2005.[46] The application is premised on: (a) contemporaneous time records recording 8,178.5 hours expended over the last seven years; (b) a sworn declaration providing a detailed narrative of the legal tasks involved, almost all of which were performed with the knowledge and encouragement of the Court; (c) Lead Settlement Counsel's current market billing rate of $700 per hour, a rate that is consistent with the billing rates of lawyers of comparable expertise and experience in the New York bar, and which is attested to by declarations of leading members of the New York bar annexed as Exhibit H; and (d) a demonstration that Lead Settlement Counsel's legal representation has played a major role in enhancing the value of the settlement fund by at least $50 million. Lead Settlement Counsel is prepared to discount his full market lodestar request by approximately 25%, and seeks a discounted award of $4,088.500.

(2) Objectors raise five sets of objections to the discounted lodestar application submitted by Lead Settlement Counsel. First, Mr Swift contests the value of the enhancements attributable to Lead Settlement Counsel's work, arguing that it is closer to $20 million than $50 million. Second, despite the supporting declarations annexed as Exhibit H, both Mr. Swift and Mr. Dubbin

[46]At the close of this litigation, Lead Settlement Counsel intends to file a final application for fees for services rendered from October 1, 2005 through the close of the litigation.

question whether Lead Settlement Counsel would, in fact, command a $700 hourly rate in the New York legal market. Third, Mr Swift, joined by Mr. Dubbin, argues that an award of full market lodestar is inappropriate for an academic lawyer because his overhead is lower than that of a private lawyer. Fourth, Mr. Swift raises what he characterizes as "macro" challenges to the reliability of Lead Settlement Counsel's billing records, suggesting that the total hours recorded in 2000 are too great to be accurate,[47] that billings for a single day exceeded 24 hours on several occasions,[48] and that billings for conferences appear excessively long.[49] Fifth, as of the February 3, 2006 deadline agreed to among counsel for the filing of objections, Mr Dubbin and Mr. Swift had raised "micro" challenges to a total of approximately 170 hours out the more than 8,000 billed.[50]

[47]Mr. Swift has been informed that his facts concerning 2000 are wrong. As described below, in 2000, Lead Settlement Counsel billed 1,808 hours for work on the Swiss bank case, plus 627 hours for work on the German slave labor cases. Since Lead Settlement Counsel was on academic leave for most of 2000, his academic time did not exceed 150 hours, for a total of approximately 2,500 hours for the year, hardly a surprising total in such a demanding year.

[48]As described more fully below in connection with each incident, the billing anomalies flow from Lead Settlement Counsel's practice of charging time to the date on which an uninterrupted cycle of work begins. Thus, work begun on one day that carried into the night and next day without interruption was routinely billed to the day on which the work began. As described below at 133-135, the dates questioned by Mr. Swift involve intensive work over three weekends when the press of work became so intense that Lead Settlement Counsel worked around the clock in an effort to fulfil his responsibilities.

[49]As described more fully below, the conferences references b Mr. Swift took place during the negotiation of Amendment 2, and reflected a series of round robin efforts by Lead Settlement Counsel to obtain the views and consent of the extremely large number of players in the negotiation.

[50]Each "micro" challenge is fully rebutted below.

None of the five sets of objections are persuasive, especially in view of Lead Settlement Counsel's pre-existing offer to discount his lodestar by 25% from the full market lodestar of $5,731, 900 to a discounted 75% lodestar figure of $4,088,500.

Objections to the Enhancement to the Value of the Settlement Fund
Attributable to the Work of Lead Settlement Counsel

(3) Objectors concede that Lead Settlement Counsel's success in negotiating the accelerated payment of the final $334 million installment payable to the settlement fund, together with pre-payment of the interest due of the third installment, generated at least $20 million in additional interest for the benefit of the settlement fund in the first year of the transaction. Indeed, the actual benefit to the class is somewhat higher, totaling approximately $22.5 million in the first year of the transaction plus the ongoing interest on the $22.5 million over the remaining life of the settlement. Even if one assumes extremely low levels of return, the additional benefit approximates $2.5 million. Thus, we begin with a concession that Lead Settlement Counsel's re-negotiation of Amendment 2 enhanced the value of the settlement fund by between $20-$25 million.

(4) In addition to re-negotiating Amendment 2, Lead Settlement Counsel worked closely with Mel Weiss in persuading Congress to exempt the interest earned by, and the distributions from, the settlement fund from federal income taxation. See *Economic Growth Tax Relief Reconciliation Act of 2001*, Sec. 803, H.R. Conf. Rep. 1836 (2001). Lead Settlement Counsel drafted proposed legislation, conferred with members of Congressional staffs in both the Senate and House, and drafted memoranda providing the legal and equitable justification for the

exemption. The exemption directly enhanced the value of the settlement fund in two ways. First, the fund has earned approximately $180 million in interest to date. While substantial settlement fund expenses, such as the cost of notice and certain costs of administration would have been deductible in calculating taxable income, without the exemption, the settlement fund would have been taxed at a 38% rate on its taxable income. I have been informed by the fund's accountants that a conservative estimate of the federal income tax savings directly attributable to the exemption is $25 million, to date. Second, the settlement fund has distributed approximately $800 million, to date, much of which would have qualified as taxable income to the recipients. While the varying marginal tax rates of the beneficiaries makes it difficult to estimate the precise economic value to the fund of rendering its distributions tax free, the sum is very substantial. For example, the $300 million in bank account distributions, to date, contained an interest component of approximately $270 million. Even if one assumes a tax rate of 20%, the value of such an exemption to the beneficiaries would be more than $50 million. Thus, the economic value of the tax exemption to the settlement fund ranges from a minimum of $25 million to a more likely figure of $100 million. For the purpose of this application, Lead Settlement Counsel has set the figure at the absolute minimum of $25 million, since the bulk of the credit for obtaining the exemption should go to Mel Weiss.

(5) Mr. Swift argues that credit for the substantial enhancement of the settlement fund attributable to the federal income tax exemption should be credited to Congress, and not the assiduous efforts of counsel who persuaded Congress to act. Mr. Swift is, of course, correct in noting that Congress's action was both generous and welcome. But he is clearly wrong in

assuming that Congress's action happened by itself. In fact, Congress's decision to exempt the fund was the result of more than one year's careful work by Mel Weiss and Lead Settlement Counsel. Taken seriously, Mr. Swift's effort to denigrate the value of the efforts of counsel in persuading Congress to act would mean that every success by a lawyer should be attributed to the decision-maker, and not to the efforts of counsel. Such a view would surprise the legions of lobbyists in Washington who command huge fees to influence the actions of Congress, and would render the efforts of counsel to persuade courts to act unworthy of compensation. In fact, Mr. Swift's ungracious refusal to credit Lead Settlement Counsel with any credit for having persuaded Congress to grant the tax exemption is consistent with this effort to obtain revenge because Lead Settlement Counsel opposed his unjustified fee application.

(6) In addition to the $20-$25 million in additional interest payments, and the minimum of $25 million in tax savings, Lead Settlement Counsel recovered a judgment against the banks for $5.2 million in additional compound interest. *In re Holocaust Victim Assets Litig.*, 256 F. Supp.3d 150 (EDNY 2003)(ruling that compound interest payable on funds deposited into the escrow account).

(7) Mr. Swift argues that such a recovery is not properly an enhancement, but merely the recoupment of a "blunder" by Lead Settlement Counsel in failing to specify that funds in the escrow fund would earn compound interest. Mr. Swift contends that the "blunder" took place when Lead Settlement Counsel negotiated Amendment 2 to the settlement agreement. While it both unseemly and undignified to be forced into this exchange, Mr. Swift's claim that Lead Settlement Counsel "blundered" in connection with recouping compound interest from the

settlement fund is so patently false as to raise questions as to his motives in bringing this challenge. In fact, the problem with the interest rate payable by the escrow fund is traceable to Mr. Swift's poor draftsmanship in November, 1998, in failing to provide clearly for the payment of compound interest when he drafted the governing language in the escrow agreement. Lead Settlement Counsel played absolutely no role in drafting the escrow agreement. Indeed, in November, 1998, he had ceased to play an active role in the case. Mr. Swift apparently claims that Lead Settlement Counsel should have corrected Mr. Swift's poor draftsmanship in connection with the execution of Amendment 1 in November, 1999. But, once again, Lead Settlement Counsel played no role in the negotiation or drafting of Amendment 1, which merely increased the ceiling in the escrow fund from $10-$20 million. Finally, Mr. Swift suggests that the problem should have been fixed when Lead Settlement Counsel provided for the pre-payment of the third and fourth installments in connection with the negotiation of Amendment 2. In fact, that is exactly what Lead Settlement Counsel did by requiring the banks to represent that compound interest was payable by the escrow fund. If Mr. Swift took the time to read Judge Block's opinion, he would find that such a representation was the concession that sealed the settlement class's victory on the compound interest issue. 256 F. Supp.3d at 155.

(8) Mr. Swift is correct, therefore, in asserting that the dispute over the interest payable by the escrow account was caused by a blunder of counsel - but it was Mr. Swift's blunder in drafting the interest provisions of the escrow fund so poorly in November, 1998. Lead Settlement Counsel's work recouped the blunder and added an additional $5.2 million to the settlement fund,

bringing the enhancements to the settlement fund attributable to his work to more than $50 million.[51]

(9) The fact that Lead Settlement Counsel's work enhanced the value of the settlement fund by more than $50 million is relevant in at least three ways.

(A) First, the $50 million enhancement figure provides a valuable cross check against which to test the reasonableness of a lodestar fee of $4,088,500.

(B) Second, the $50 million enhancement provides an independent basis for a common fund award based upon a substantial economic benefit conferred upon the settlement classes. While Lead Settlement Counsel believes that his request for an award of $4,088,500 is justified on lodestar grounds alone, to the extent the Court disagrees, Lead Settlement Counsel asserts a claim for a common fund award in an amount needed to bring the total award to $4,088,500.

(C) Finally, the existence of a $50 million enhancement in the value of the settlement fund attributable to Lead Settlement Counsel's efforts would render it inequitable in the extreme to reduce Lead Settlement Counsel's award below 75% of the true market value of his services, while retaining the $50 million in enhancements generated by his efforts, especially when Lead Settlement Counsel has already discounted his lodestar request approximately 25% from the true market lodestar figure of $5,731,900, to a discounted figure of $,4, 088,500. Under

[51]An additional minor enhancement is attributable to the insurance claims program negotiated by Lead Settlement Counsel in connection with Amendment 2. While Mr. Dubbin placed a fantastic value of between $50-$100 million on the insurance program in connection with his fee petition, in fact the economic value of the program is modest. I estimate its value at $1 million. The real value of the insurance program was its value in opening the way for the acceptance of the settlement as fair.

Goldberger v. Integrated Resources Co., 209 F.3d 43 (2d Cir. 2000), a District Court in this Circuit may choose between a market lodestar or a percentage fund award. A District Court may not, however, drive a counsel's fees far below market rates, while simultaneously ignoring the significant enhancement to the value of the settlement fund attributable to counsel's work.

Objections to the $700 Hourly Lodestar Rate

(10) In accordance with prevailing law in the Second Circuit, Lead Settlement Counsel has utilized his current market billing rate of $700 per hour in lieu of an interest component in connection with this application for fees for services performed over a seven year period. *Le Blanc-Sternberg v. Fletcher,* 143 F.3d 748, 764 (2nnd Cir. 1998). Objectors challenge the $700 figure on two grounds. First, they question whether Lead Settlement Counsel could command a $700 hourly fee in the current New York legal market. Second, they argue that since Lead Settlement Counsel is an academic, his overhead charges are so low that it would be inequitable to award full market rates without a discount reflecting an academic's extremely low cost structure. Neither objection has merit, but if the Court deems a "low overhead" discount appropriate, the Court should note that Lead Settlement Counsel has already discounted his lodestar fee by approximately 25% from the full market lodestar of $5,731,900, to a discounted lodestar of $4,088,500. Accordingly, any "low overhead" discount must be calculated against the full market lodestar $5,731,900, and not against a figure that has already been significantly and artificially discounted.

(11) Objectors' first concern - that Lead Settlement Counsel would not command a $700 hourly rate in the New York legal market - is easily refuted. Lead Settlement Counsel has

submitted declarations from three knowledgeable and respected figures in the New York bar, F.A.O. Schwarz, Jr., a long-time partner at Cravath, Swain and Moore and former Corporation Counsel of the City of New York; James Johnson, a partner at Debevoise & Plimpton and former Undersecretary of the Treasury for Enforcement; and Joshua Rosencranz, a partner at Heller, Ehrman, attesting to the fact that a $700 hourly fee for a lawyer of Lead Settlement Counsel's experience, ability and reputation falls well within the parameters of the New York legal market. The declarations are annexed as Exhibit H. A similar declaration has been submitted by the Dean of the University of Houston School of Law, who is a nationally acknowledged bankruptcy expert with wide knowledge of the various legal markets. She opines that a $700 hourly rate for a lawyer of Lead Settlement Counsel's experience and expertise is clearly appropriate. Finally, Lead Settlement Counsel is currently representing private clients in a complex Supreme Court proceeding, an arbitration, and a complex legal representation involving both civil and criminal issues, in all three of which he is billing at $700 per hour. Apart from snide comments about law professors, objectors have produced absolutely no evidence to refute such overwhelming proof of Lead Settlement Counsel's current market rate. Mr. Swift's challenge to Lead Settlement Counsel's $700 hourly rate is particularly unpersuasive, coming as it does from a lawyer who filed a fee petition in this case five years ago in which he received a "generous" award as a result of my efforts that totaled $600 per hour. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 325 (EDNY 2002).

(12) It should not come as a surprise that Lead Settlement Counsel's current market billing rate is $700 per hour. Prior to becoming involved in this case, Lead Settlement Counsel had

maintained an extremely successful private consulting practice since the mid-1970's in connection with which he charged the prevailing market rate for lawyers of his experience and expertise in the New York legal market. When he accepted the Court's request that he serve as Lead Settlement Counsel, the physical demands of the job made it necessary to terminate his consulting practice in 1999. However, in the years prior to January 1999, Lead Settlement Counsel had represented numerous private clients at full market rates, including, among many others, the Metropolitan Transportation Authority (extensive opinion letter concerning the ability of bond covenants to withstand municipal bankruptcy); Long Island Lighting Company (litigation culminating in Supreme Court involving First Amendment challenge to limits on speech); *Cullen v. Margiotta* (coerced contributions by municipal employees - court-awarded fee award based on full market lodestar; no discount for low overhead); the Association of National Advertisers, Inc (trade association of nation's largest corporate advertisers over a ten year period in connection with repeated Congressional testimony and litigation regarding First Amendment activities). Indeed, more than five years ago, in connection with my fee application submitted to the German Foundation arbitrators in November, 2000, I utilized my full market lodestar rate for 2000. The arbitrators raised no questions about either the hourly rate, or the appropriateness of awarding market rates to an academic. Given this record, there is no doubt that under existing Second Circuit law the demonstrated market lodestar of $700 per hour must be accepted. *Farbotko v. Clinton County*, 433 F.3d 204, 208 (2nd Cir. 2005).

Insistence on an "Academic Discount" Reflecting Low Overhead

(13) Objectors' second concern - that academic lawyers in common fund cases are not entitled to a full market lodestar award because they operate at a lower cost structure than private attorneys - raises issues of both law and equity. The District Court recognizes that in *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court ruled unanimously that fee awards under 42 U.S.C. 1988 must reflect the market value of an attorney's services, not a cost plus calculation that would result in a fee differential between private lawyers and public interest lawyers with a lower cost structure. Moreover, the District Court recognizes that the rule in *Blum* applies in the literally hundreds of settings in which Congress has provided for the payment of attorneys' fees. Lead Settlement Counsel knows of no instance when Congress has utilized anything other than market rates in the context of court awards of attorneys' fees, including settings such as anti-trust and patent law falling outside the rubric of public interest litigation.

(14) The District Court has noted, however, that the holding in *Blum v. Stenson* does not necessarily control this fee application because *Blum* dealt with statutory fees under 42 U.S.C. 1988, and was, therefore, governed by Congressional intent. In a common fund case such as this one, noted the District Court, the award of fees is not governed by statute, but is a judicially administered exercise in equity and unjust enrichment. See John Dawson, *Lawyers and Involuntary Clients: Attorneys Fees from Funds*, 87 Harv. L. Rev. 1597 (1974). In fact, however, Justice Powell noted in *Blum* that in enacting 42 U.S.C. 1988, Congress was adopting the uniform practice of the *courts* in awarding *non-statutory* fees on a market, not a cost plus basis; a uniform practice that had prevailed in the courts prior to the decision in *Alyeska Pipeline Service Co. v.*

Wilderness Society, 421 U.S. 240 (1975) that had necessitated the passage of 42 U.S.C. 1988.[52] See *Blum*, 465 U.S. at 894, n. 10 ("None of the cases decided at that time [prior to the statute] had adopted a cost-based approach to calculating fees. Reference to market rates was uniform."). Thus, although it is technically accurate to describe *Blum v. Stenson* as a statutory case, it is inaccurate to ignore that Congress was merely codifying the uniform non-statutory practice of the judiciary that had pre-dated the statute.

(15) In fact, ranging across the entire body of current American law on the award of attorneys' fees for the past 20 years, including the numerous statutory fee shifting cases and the equally numerous non-statutory common fund fee cases, there is no reported case of an academic lawyer's fees being reduced below prevailing market levels because of low overhead. Instead, American courts have uniformly followed the excellent advice of Judge Posner in *In re Continental Illinois Securities Litig.,* 962 F.2d 566, 568 (7th Cir. 1992) that "it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services on the market rather than being paid by court order."

(16) The only reported example of an academic's fees being discounted for low overhead took place more than 20 years ago in the Agent Orange litigation when Judge Weinstein awarded "partners" a lodestar fee 17% higher than the lodestar fee for law professors. *In re Agent Orange*

[52]Prior to *Alyeska Pipeline*, the courts had awarded non-statutory attorneys' fees under a "private attorneys' general" theory. *Alyeska Pipeline* ruled, however, that under the "American rule" on attorneys' fees, statutory authorization was required in the absence of a common fund within the meaning of *Trustees v. Greenough,* 105 U.S. 527 (1882) and *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970).

Prod. Liability Litig., 611 F. Supp. 1296 (EDNY 1985). Judge Weinstein justified the lower lodestar, in part, on the grounds that law professors have lower overhead, but more importantly, because academic lawyers do not ordinarily forego other market-rate clients when they work on a common fund case. In this case, however, unlike the academic lawyers in *Agent Orange*, Lead Settlement Counsel abandoned a flourishing and lucrative consulting practice based on market rates in order to accept the Court's invitation to serve as Lead Settlement Counsel. In any event, Judge Weinstein also immediately awarded the academic lawyers in *Agent Orange* a 1.5% excellence multiplier that actually *increased* their effective lodestar rates to 20% *above* the lodestar rate of partners. 611 F. Supp, at 1329-30. The Second Circuit affirmed the enhanced award. 818 F.2d 226, 234 and n 2. Given this Court's award of a 1.32 excellence multiplier to Mr. Swift in connection with his pre-settlement fees (*In re Holocaust Victim Assets Litigation,* 270 F. Supp.3d 313, 325-26 (EDNY 2002), even if the Court were to impose a discount for low overhead, Judge Weinstein's ruling in *Agent Orange* virtually compels a similar offsetting excellence award to Lead Settlement Counsel in an amount needed to allow his award to reach $4,088,500, 75% of his true market lodestar. See 818 F.2d at 234 (excellence multiplier particularly appropriate where true market lodestar has been altered).

(17) Finally, even if one ignores the virtually universal practice of awarding academic lawyers their true market lodestar, it would be both inequitable and unreasonable for the Court to reduce Lead Settlement Counsel's fee award below $4, 088,500, the 75% of market lodestar sought in this application. The power to award a non-statutory fee in a common fund case derives from principles of unjust enrichment and is based solely on the value of the benefit conferred

upon the class. *Trustees v. Greenough,* 105 U.S. 527 (1882); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970). The Supreme Court has recognized that where, as here, an attorneys' efforts have generated significant material benefits for a group of individuals, the group would be unjustly enriched unless it compensated the lawyer with a reasonable fee linked to the value of the benefits conferred. The law recognizes two methods of calculating the reasonable fee: (a) a lodestar calculation that seeks to replicate the market value of the lawyer's services by multiplying the lawyer's hourly billing rate by the number of hours expended in performing the necessary tasks; and (b) a percentage of recovery calculation that awards a percentage of the benefit actually conferred upon the group.

(18) In this case, Lead Settlement Counsel's seven years of service have provided the following substantial material benefits to the settlement classes: (a) an enhancement of the value of the settlement fund of at least $50 million; (b) successful defense of the settlement fund against unjustified demands for fees (including fees sought by Mr. Swift and Mr. Dubbin) totaling $15-$20 million; (c) successful defense of the settlement fund against unjustified payments (such as demands by Dr. Weiss, DRA and Pink Triangle) totaling more than $50 million; (d) successful defense of the members of the settlement classes against repeated efforts to flood the settlement class with large numbers of additional class members, thereby dramatically diluting the value of each class member's interest in the settlement fund;[53] and (e) the development and successful defense of an effective and fair allocation and distribution process that has survived waves of legal

[53]The two most dramatic examples of anti-dilution defense took place in *In re Holocaust Victim Assets Litig.,* 225 F.3d 191 (2nd Cir. 2000)(defense of class definition against national origin intervenors); *In re Holocaust Victim Assets Litig.,* 282 F. 3d 103 (2nd Cir. 2002)(defense of slave labor II limits)

attack (from Mr. Swift and Mr. Dubbin) and that has distributed approximately $800 million to class members to date. These material benefits did not happen by themselves. They are the result of sustained and dedicated work by Lead Settlement Counsel. No doubt exists that if Lead Settlement Counsel were not an academic, the class would be obligated to pay him a fee calculated at the market value of his services - or $5,731,900. Lead Settlement Counsel has already discounted that figure by approximately 25% to $4,088,500. For the Court to further drive the award below 75% of true market value merely because Lead Settlement Counsel is an academic with an efficient cost structure would unjustly enrich the class by enabling it to secure services valued by the market at $5,731,900 at a doubly discounted figure.

(19) The economic value of the tangible benefits conferred on the class as the result of the legal services provided by Lead Settlement Counsel does not vary depending on whether he is practicing privately or is an academic. Indeed, the cost structure underlying the services is utterly unconnected to the value of the tangible benefits those services provide to the settlement classes. That value is fixed in the economic enhancements obtained; the unjustified payments avoided; the dilution prevented; and the allocation and distribution achieved, entirely without regard to the lawyers' cost structure.

(20) Since the value to the class of the economic benefits that Lead Settlement Counsel's dedicated and successful work has conferred upon it does not vary according to his cost structure, it would be inequitable under settled principles of unjust enrichment allow the class to retain the full value of the economic benefits conferred upon them, while authorizing the class to refuse to pay 75% of the fair market value of the services required to achieve such benefits. As Judge

Posner has noted, fee awards are not about setting a medieval "just price" where a judge decides to "correct" the market by making it more "just." In our system, the market sets the fair price; not a judge - or any other government official - dabbling in abstract fairness. A doctrine that seeks to set a "fair" price other than the market based upon the cost structure of the seller comes disturbingly close to applying "from each according to their abilities; to each according to their needs." While such a sentiment may appear morally compelling, it should play no role in the setting of fees in a market economy.

(21) It would be particularly inequitable in this case to reduce Lead Settlement Counsel's award below 75% of his true market lodestar because the nature and quality of his legal services provided to the settlement classes were so imaginative, so well executed, and so successful in enhancing the economic value of the settlement fund by more than $50 million, that, as in Judge Weinstein's fee award in *Agent Orange*, they qualify for a multiplier for excellence. At Lead Settlement Counsel's urging, this Court awarded Mr. Swift an 1.32 excellence multiplier for his pre-settlement activities.[54] *In re Holocaust Victim Assets Litig.,* 270 F. Supp.2d 313, 326-26

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[54]Lead Settlement Counsel has come to Mr. Swift's defense twice during litigation over Holocaust litigation-related fees. When it became apparent that a risk multiplier was not appropriate in this case, Lead Settlement Counsel informed Mr. Swift that he believed that his lodestar time did not accurately reflect the value of his pre-settlement services. Accordingly, Lead Settlement Counsel successfully urged the Court to award Mr. Swift a modest excellence multiplier of 1.32. *In re Holocaust Victim Assets Litig.,* 270 F. Supp.2d 313, 325-26 (EDNY 2002). The Court repeatedly noted Lead Settlement Counsel's "generous" treatment of Mr. Swift's fee application.

In connection with fees awarded by the German Foundation auditors, Mr. Swift's fees were challenged by persons who argued that he was unable to simultaneously receive fees as Lead Settlement Counsel in the Austrian banks case and serve as paid counsel in the German Foundation matter because of an inherent conflict between the two roles. The objection was not frivolous. Indeed, I had refused to sign the Austrian bank settlement agreement in part because of the potential for conflict of interest. Nevertheless, I successfully defended Mr. Swift's right to a

(EDNY 2002). Given the quality of the legal services provided by Lead Settlement Counsel, it would have been appropriate to seek an excellence multiplier. Instead, Lead Settlement Counsel discounted his lodestar request 25%. If this Court elects to impose a virtually unprecedented low overhead discount on Lead Settlement Counsel that would drive his award below the 75% lodestar request, Lead Settlement Counsel requests an off-setting excellence multiplier sufficient to restore the award to $4,088,500. More than 20 years ago in the only reported example of imposing a discount on an academic lawyer, Judge Weinstein immediately offset the 17% discount by an award of a 1.5 excellence multiplier that *increased* their lodestar rates to 20% *above* the lodestar rate of partners. *In re Agent Orange Prod. Liability Litig.,* 611 F. Supp. 1296, 1329-30 (EDNY 1985). The Second Circuit affirmed the enhanced award. 818 F.2d 226, 234 and n 2. Given this Court's award of an excellence multiplier of 1.32 to Mr. Swift in connection with his pre-settlement fees (*In re Holocaust Victim Assets Litigation,* 270 F. Supp.3d 313, 325-26 (EDNY 2002), even if the Court were to impose a discount for low overhead, Judge Weinstein's ruling in *Agent Orange* virtually compels an off-setting excellence award to Lead Settlement Counsel in an amount needed to allow his award to reach $4,088,500, or 75% of his true market lodestar. See 818 F.2d at 234 (excellence multiplier particularly appropriate where true market lodestar has been altered). While excellence awards are - and should be - rare, the extraordinary success of

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$3.5 million fee in the Second Circuit.

The Court may recall that I also sought to persuade it to grant a modest fee to Mr. Dubbin.

Lead Settlement Counsel in navigating this settlement to a successful implementation, while actually enhancing the value of the settlement fund by at least $50 million, clearly merits a modest excellence multiplier designed to do nothing more than enable Lead Settlement Counsel to receive an award equal to 75% of his true market lodestar.

(22) It would be particularly inequitable to impose a low overhead discount on Lead Settlement Counsel, while simultaneously declining to permit Lead Settlement Counsel to seek a percentage of recovery award premised on the enhancement of the settlement fund by more than $50 million. Lead Settlement Counsel is prepared to forego any effort to receive a fee for his work in enhancing the settlement fund. But such a concession assumes that the District Court will not impose a low overhead discount the would drive the lodestar award below 75% of Lead Settlement Counsel's true market lodestar. If the Court imposes a low overhead discount that drives the fee award below $4,088,500, 75% of true market lodestar, Lead Settlement Counsel requests an appropriate offsetting fee keyed to the enhancement of the value of the settlement fund by more than $50 million. Even if Lead Settlement Counsel's entire requested fee were treated as a percentage of recovery keyed to the actual increase in the value of the settlement fund attributable to his effort, the award would constitute 7% of recovery, or far below the normal range in this Circuit. See *Wal-Mart Stores, Inc., v. Vias U.S.A. Inc.,* 396 F.3d 96 (2nd Cir. 2005). In this application, however, Lead Settlement Counsel asks far less - only that an extremely modest percentage of recovery award be granted to offset any low overhead discount in order to bring the actual award to $4,088,500, 75% of true market lodestar. While *Goldberger v. Integrated Resources Inc.,* 209 F.3d 43 (2nd Cir 2000) makes it clear that a District Court may choose

between lodestar and percentage of recovery in granting a fee in a common fund case, especially in the context of post-settlement fees posing a lower risk of non-recovery,[55] the case does not authorize a District Judge to drive rates below 75% of true market lodestar, while simultaneously refusing to consider an extremely modest offsetting award based on enhancement of the value of the settlement fund by at least $50 million. In *Goldberger,* the Court awarded full market lodestar. In this case the District Court has elected to use the lodestar rather than percentage of recovery technique in calculating fees. Lead Settlement Counsel has no quarrel with such a decision. Indeed, unlike *Goldberger,* Lead Settlement Counsel seeks only 75% of lodestar. With respect, however, under *Goldberger,* the Court may not drive rates below 75% of true market lodestar by imposing low overhead discounts on top of a voluntary discount, while simultaneously refusing to acknowledge the availability of an offsetting award based on the enhancement of the value of the settlement fund. *Golberger* authorizes a choice between true market lodestar and percentage of recovery. It does not authorize a decision to award neither.

(23) Finally, when Lead Settlement Counsel filed this application, it was under the belief that true market lodestar applied without an extraordinary and virtually unprecedented low overhead discount for academics. If the Court is determined to apply such a discount, and if it refuses to recognize offsetting awards for excellence or for enhancement of the fund’s value, Lead Settlement Counsel respectfully withdraws his offer of a 25% lodestar discount, and seeks his full

[55]It would be inaccurate to characterize Lead Settlement Counsel’s post-settlement work as wholly without risk. Unlike the Special Masters, had Lead Settlement Counsel failed in developing and defending a viable plan to implement the settlement, no fees would have been payable. In effect, Lead Settlement Counsel bet the prospect of future fees on being able to develop and defend a viable plan to implement the settlement. Given the uncertainties generated by *Amchem*, the risk was real.

lodestar of $5,731,900, against which the Court may apply a low overhead discount. It would be grossly unfair to require Lead Settlement Counsel to submit to a double discount.

Objections to Lead Settlement Counsel's Contemporaneous Time Records

(24) Lead Settlement Counsel has filed detailed contemporaneous time records reflecting the expenditure of 8,178.5 hours in connection with his service as Lead Settlement Counsel. The contemporaneous time records, annexed as Exhibit C, describe the legal task, the amount of time expended on the task, and the date on which the work was done. Each time entry has been cross-checked to the computer entry reflecting the preparation of the document associated with the task. Moreover, virtually every task was performed at the request of the Court, and under the Court's supervision, permitting the Court to assess the need for the work, its quality and the reasonableness of the time expended.

(25) Three aspects of Lead Settlement's notoriously stringent work habits[56] are reflected in the contemporaneous time records.

(A) First, as an academic, Lead Settlement Counsel is in a position to control demands on his time that are not usually open to private lawyers servicing a multitude of clients. Accordingly, whenever possible, Lead Settlement Counsel attempted to block out time to work without interruption exclusively on tasks related to this case. Whenever possible, for efficiency's sake, Lead Settlement Counsel sought to complete a given task in a single bloc of time, without

[56] Lead Settlement Counsel has practiced as an academic lawyer for more than 40 years. Mr Dubbin has helpfully placed into the record an article in the NYU Alumni Magazine chronicling aspects of his career. As the NYU Alumni article chronicles, long before this fee application, the one constant in Lead Settlement Counsel's career has been very hard work, and very long hours. The District Court once jokingly accused Lead Settlement Counsel of "being on steroids" because he worked so hard and produced so much material. A copy of Lead Settlement Counsel's *curriculum vitae* is annexed as Exhibit E.

breaking for other responsibilities. Legal tasks which, in a private lawyer's practice, would be spread over multiple entries on numerous days, with attendant inefficiencies, are often concentrated in a single bloc, or a series of blocs in an effort to render the work more efficient, and to stimulate perceptions that emerge cumulatively over longer periods of time.

(B) Second, Lead Settlement Counsel routinely works very long hours. Long before the acceptance of the responsibility of Lead Settlement Counsel in this case, I routinely worked 12-15 hour days. I work every weekend, and have not taken a vacation that has not entailed significant work in more than a decade. When I was awaiting open heart at New York Hospital, I worked on my laptop and filed Holocaust litigation-related documents as I was being prepared for surgery. When Chief Judge Korman paid me a visit at home shortly after the surgery, he did not bring a novel with him. He brought me work.

(C) Third, Lead Settlement Counsel routinely works late into the night. For the past ten years, I have routinely worked until the early hours of the morning. It is not uncommon for me to work through the night when necessary to complete a project, or where a thought appears to be developing into useful form.

(26) Objectors lodge two forms of attack on the contemporaneous time records. Mr. Swift raises a series of "macro" challenges designed to question the integrity of the records by arguing that it would be unlikely for Lead Settlement Counsel to have been able to bill the recorded hours in a given time frame, either because they exceed the likely number of billable hours in a given year, or because the exceed the likely number of hours billable in a single day. He also questions whether time billed to certain conferences accurately reflects the time actually

spent. Mr. Swift also argues that Lead Settlement Counsel should have delegated tasks to lawyers with lower billing rates, and claims, falsely, that he was prepared to perform the tasks free. Mr Dubbin and Mr. Swift also raise a series of micro challenges to approximately 170 hours out of the more than 8,000 recorded. Not one of the challenges is persuasive.

Macro Challenges to Lead Settlement Counsel's Billing Records

(27) Mr Swift's principal "macro" challenge is to the year 2000. He notes that counsel has billed 1,808 hours in 2000, while also working on the German slave labor cases and teaching at NYU Law School. Mr. Swift hypothesizes that, given the three sets of tasks, my billable hours in 2000 must have reached 4,267, which he rightly observes is an unlikely number. But Mr. Swift simply has the facts wrong. I did, indeed, bill 1808 hours in 2000 in this case. I also billed 627 hours in the German slave labor cases.[57] I was on academic leave from NYU from April-December, 2000. In view of my work on the Holocaust cases, I was given a diminished teaching responsibility from January-April, 2000, consisting of one three credit hour class over a 14 week semester, or 42 hours of classroom teaching. At most, I expended 150 hours on academic work in 2000. Thus, the real total for 2000 is not Mr. Swift's fantasy of 4,267 hours, but a realistic 2,500 hours, a modest figure given the intense work environment that existed in 2000, when I was simultaneously re-negotiating Amendment 2, seeking the Court's approval of the fairness of the settlement under Rule 23(e), responding to Mr. Dubbin's objections, and dealing with the Special Master's first allocation decisions.

[57]The number of hours billed to the German slave labor cases in 2000 (627) were provided to Mr. Swift during the discovery phase of this challenge which ended, by agreement of counsel, on February 17, 2006. Characteristically, Mr. Swift mangles the numbers in his papers, transposing the German billable hours from 627 to 867.

(28) Mr. Swift's second macro challenge is to the fact that on several days during the past seven years, I billed more than 24 hours, reflecting long stretches of work on consecutive days. As I have explained, I have long adopted a billing practice that assigns the time for a continuous bloc of time to the date that I began the uninterrupted bloc of work. Thus, on a day when I began work on the afternoon or evening of a given date, but worked continuously past midnight into the next day, I routinely assigned the time to the date on which I began the task. Every one of the several anomalies noted by Mr. Swift are attributable to that practice. I will treat each anomaly noted by Mr. Swift as a micro challenge, as well, and respond to it in detail *infra.* As a macro challenge, the 24 hour day challenge fails because it ignores my nocturnal work habits and routine billing practices.

(29) Mr. Swift's next macro challenge is a contention that I failed to delegate tasks to lawyers with lower billing rates. One obvious answer to the charge is that the path breaking nature of most of the work precluded delegation. The Court placed the responsibility of Lead Settlement Counsel upon me for a reason. Delegation to other lawyers would have defeated the reason the Court drew me back into the case in the first place. Another obvious answer is that delegation of important tasks to Mr. Swift would have been unthinkable. Given his less-than-admirable track-record in drafting the settlement as initially drafted, his unjustified personal attacks on me in the context of his inflated fee petition, and his adamant opposition to the claims-based implementation structure imposed by the Court, I would never have trusted him with anything important.

(30) Moreover, given the enormously complex factual and legal record developed over 10 years of litigation, delegation would have been inefficient, requiring a new lawyer with limited background in the litigation to master details and history before commencing useful work. The truth is that I would have loved to delegate many of my responsibilities in order to permit me to return to my private consulting practice and to my academic pursuits, but I deemed it irresponsible to do so.

(31) Finally, the record demonstrates that I delegated substantial tasks, whenever it was possible and responsible to do so. For example, I delegated much of the responsibility for the notice program to Morris Ratner, who carried out his responsibilities brilliantly. In addition, I turned to Morris Ratner on a number of occasions to help me perform important tasks, including most of the time-consuming technical work associated with producing appellate briefs and appendices. I understand that the Lieff, Cabresser firm has incurred more than $1 million in time charges fulfilling tasks that I delegated to Mr. Ratner. Were it not for Mr. Swift's foolish insistence that all post-settlement fee petitions be filed with the Court prior to March 15, 2006, in the obvious hope of entangling my petition in delays, I believe that Mr. Ratner's post-settlement time might well have been donated to the class. I now understand that it will be the subject of a fee petition. In addition, as the Court knows, with the Court's permission, I retained the services of a recent NYU student, Michelle Weitz, who possessed a deep knowledge of the history of the litigation because of her volunteer activities as a student, to perform a series of necessary tasks that did not require significant legal expertise and experience. Ms. Weitz was paid by the settlement fund on a salaried basis equivalent to the salary earned by a law clerk to a federal

judge. Ms. Weitz performed extremely valuable services at very low cost, and left her position only because her spouse accepted a job that might be seen as creating a conflict. Finally, I consistently delegated appropriate tasks to Deborah Sturman, who has reviewed questionnaires, provided valuable assistance in preparing appellate briefs, worked with law students, and, most importantly, administered the disbursement mechanism for the settlement fund, a careful system that requires Mr Weiss and myself to provide written authorization for any disbursement from the settlement fund.

(32) Mr. Swift's final macro objection is a false assertion that he and other lawyers were available who would have carried out the post-settlement work *pro bono*. He asserts, falsely, that in connection with his fee application, he informed the Court that he was willing to carry out post-settlement tasks *pro bono* from and after November 30, 2001. In fact, what Mr. Swift actually told the Court was that in connection with his $12 million fee application, if an unjustified 2.29 risk multiplier for his work to date were granted, he had no intention of seeking compensation for the "modest" time charges that he had incurred after November 30, 2001. In fact, Mr. Swift never offered to perform substantial post-settlement work on a *pro bono* basis. Mr. Swift does not deign to identify the other lawyers willing to work for seven years without compensation. None of the settlement counsel ever expressed such a willingness, nor would I have expected them to expend 8,000 hours without compensation.

Micro Challenges to Lead Settlement Counsel's Billing Records

(33) After two months of scouring Lead Settlement Counsel's time records, by February , 3 2006, at the close of the period agreed upon between counsel for raising objections, Mr. Dubbin

and Mr. Swift had posed "micro objections to a total of 170 hours out of the 8,178.5 hours billed. None of the micro objections are persuasive.

(34) Mr Dubbin has launched a series of micro challenges, claiming to find evidence of either falsehood or unreliability in the records. Each challenge is easily refuted. Nothing in Mr. Dubbin's micro submission casts doubt on any of the records, except to highlight that counsel took his responsibilities very seriously and worked long hours in seeking to implement the settlement.

(a) September 23, 2003 - Kingsboro Community College Forum – Mr. Dubbin incorrectly asserts that Lead Settlement Counsel failed to attend a community forum at Kingsboro Community College for which counsel billed 2 hours. In fact, counsel attended the forum for more than 2 hours, arriving at approximately10:30 am for a scheduled afternoon panel discussion of the settlement. Lead Settlement Counsel arrived early to make himself available to individual class members with questions about the claims processes. After more than two hours of individual discussions, Lead Settlement Counsel declined to participate further and left the building because certain members of the audience, including representatives of Norman Finkelstein, became personally abusive, and made derogatory remarks concerning counsel's deceased daughter;

(b) December 3, 2004-February 22, 2005 - Report on Settlement Administration for publication by Michael Bazyler – Mr. Dubbin complains that counsel billed 26.5 hours for writing a detailed report on the administration of the settlement for publication by Professor Michael Bazyler in a forthcoming book on Holocaust-related litigation. Lead Settlement Counsel was, in fact, asked, without compensation, to prepare a detailed report on the administration of the

Swiss settlement for widespread publication by Professor Bazyler in a book that would be widely available to the public. Since such an opportunity provided an excellent way to inform the class and the public of the progress of the settlement, the 26.5 hours were undoubtedly well-spent;

(c) Dec. 30, 1999 - Mr. Dubbin complains that it should not have taken 2 hours to respond to his letter. In fact, the time was taken preparing for the challenges to the settlement's fairness that were obviously being planned by Mr. Dubbin, and that were eventually filed in 2000. Lead Settlement Counsel had just received instructions from the Court to renegotiate significant provisions of the settlement, and was seeking to place the Dubbin objections in the context of the forthcoming negotiations – the time was necessary and well spent;

(d) December 22, 2000 – Mr. Dubbin complains that Lead Settlement Counsel spent 2 hours analyzing allocation issues raised by Mr. Dubbin's appeal to the Second Circuit from the District Court's allocation rulings prior to the filing of Schedules C and D. However, it was obvious what Mr. Dubbin's objections were. He had fully articulated them in the District Court. It would have been silly to wait for the C and D filing, which added nothing to counsel's knowledge;

(e) Feb. 28, 2001 – Mr. Dubbin complains that counsel spent 11 hours researching the *cy pres* implications of the Dubbin allocation appeal on the same date that he spent 9 hours working on the Katz appeal challenging both *cy pres* and other aspects of the settlement's fairness. In fact, it was a long and exhausting day's work. Given the importance of the two appeals to the ongoing implementation of the settlement (as a practical matter, no distributions could be made until the appeals were resolved), the time was obviously important and well spent.

The record reflects that I sought in every way possible to move the appeals to a resolution as quickly as possible. Moreover, in connection with the Katz appeal, I was exploring whether an award might be available from the German Foundation

(f) February 28, 2001 - In a despicable effort to impeach Lead Settlement Counsel's credibility by asserting a known falsehood, Mr. Dubbin argues that the phrase "HSF" appears in Lead Settlement Counsel's contemporaneous records on Feb 28, 2001, even though formal notice of the organization's existence was not given to the Court until much later. The allegation is obviously designed to raise an inference that Lead Settlement Counsel's time records are not contemporaneous. In fact, as Mr. Dubbin's letter to the Court, dated November 20, 2003, states, Lead Settlement Counsel was informed of the formation of HSF on November 20, 2000 (more than three months *prior* to the time entry), in a declaration filed with the Court by Leo Rechter. Moreover, Mr. Dubbin's letter to the Court, dated December 2, 2003, notes that HSF had filed appeals from the District Court's allocation orders in December, 2000. In fact, the existence of HSF was first made known to Lead Settlement Counsel and the Court on November 16, 2000, in a letter utilizing HSF letterhead signed by Joe Sachs and Leo Rechter. Mr. Dubbin was unquestionably aware of these facts when he launched his despicable charge, since they are drawn from his 2004 motion papers arguing that HSF had standing to appeal from the Court's allocation orders.

(g) August 23, 2002 - Mr. Dubbin complains that counsel spent 3.5 hrs on August 23, 2002 discussing Mr. Dubbin's objections to the allocation of interest, and 6.5 hrs reviewing the objections with other counsel and analyzing them. Once again, since the objections threatened the flow of additional funds to poor survivors, Lead Settlement Counsel, who was on vacation, made every effort to deal immediately with the objection, head it off by a day-long series of phone call and conferences, and, if necessary, take the necessary legal precautions to assure the unbroken flow of funds. Reviewing the calculation of the interest, and the legal authority to make the *cy pres* allocation consumed the bulk of the time, which was necessary and well spent;

(h) communication with the class – Mr. Dubbin objects to compensation for time spent in appearing at fora in order to explain how the settlement worked, to provide information concerning the filing of claims, and to answer unfair criticism of its terms by Holocaust deniers or minimizers. Mr Dubbin's objection is premised on Lead Settlement Counsel's earlier objections to Mr. Dubbin's effort to seek fees for his speeches before Jewish audiences. However, the duty to explain the operation of the settlement to audiences containing potential claimants is clearly distinguishable from Mr. Dubbin's speeches setting forth his personal views. Informing the class of the terms of the settlement, and the mechanics of filing claims is clearly the responsibility of Lead Settlement Counsel. It is fully distinguishable from speeches given by Mr. Dubbin expressing his personal views, for which he demanded unjustified compensation;

(i) Mr. Dubbin objects to compensating Lead Settlement Counsel for evaluating fee requests, including Mr. Dubbin's preposterous claims for fees, arguing that counsel represented that he was doing so *pro bono*. Once again,. Mr. Dubbin willfully misunderstands the difference between pre-settlement *pro bono* work, which was relevant to the calculation of other counsel's pre-settlement fees, and post-settlement work, which was wholly unrelated to the fees. The language quoted by Mr. Dubbin involves the appropriateness of awarding a risk multiplier to Mr.

Swift for pre-settlement work when pre-settlement *pro bono* representation was available. It has absolutely nothing to do with post-settlement work;

(j) Astonishingly, Mr. Dubbin objects to compensating counsel for the significant number of hours spent negotiating disclosure and claims processing provisions on behalf of the deposited assets, slave labor I and II, and refugee classes, arguing that the successful work provided little or no benefit to the class. Such an astonishing mis-statement is belied by the fact that the claims programs painstakingly negotiated by Lead Settlement Counsel have resulted in the payment of almost $600 million to named members of the deposited assets, slave labor and refugee classes. The objection reveals Mr. Dubbin's myopia, which allows him to view the case solely from the perspective of a small group of objectors interested solely in the allocation of funds to the looted assets class;

(k) Mr. Dubbin objects to fees for negotiating the insurance program. This is an astonishing turn-about from Mr. Dubbin's initial characterization of the insurance claims program as worth $100 million in his fee application. In fact, the insurance claims program is modest, but objectors at the fairness hearing that no insurance claims program existed had imperiled the settlement and had forced the Court to direct Lead Settlement Counsel to negotiate an insurance claims program to permit the $1.25 billion settlement to be approved. Lead Settlement Counsel did so. None of the information gathered by Mr. Dubbin was remotely relevant to such a claims program. If Mr. Dubbin wishes to pursue an action against the Swiss insurance industry based on the information he claims to have unearthed, he remains free to do so;

(l) Mr. Dubbin's final objection is an attempt to, once again, claim that different parts of the class should be set off against each other. Mr. Dubbin claims that counsel's requested fee of $4,088,500 for seven years of work exceeds the looted assets payments to needy American survivors. In fact, $205 million in Looted Assets payments have been allocated for payment over the life expectancies of the poorest survivors, wherever they reside, including approximately $10 million to needy survivors residing in the United States. Moreover, approximately 25%-30% of the $800 million distributed to class members thus far has been paid to survivors residing in the United States.

(m) Lead Settlement Counsel notes that after two months of effort, Mr. Dubbin and Mr. Swift have objected specifically to approximately 170 hours of the more than 8,000 hours recorded in Lead Settlement Counsel's fee application. Since Lead Settlement Counsel has already discounted his fee by approximately 25% (or 2,000 hours), and since Lead Settlement Counsel inadvertently omitted 200 hours expended in 2004 in connection with the four appeals to the Second Circuit, for which he does not currently seek compensation, the objectors' quibble with 170 hours which, even if wrongly, sustained would simply be substituted for by qualifying but uncharged hours, is a gross waste of the time of the Court and counsel.[58]

(35) Mr. Swift's "micro" challenges concentrate on the six occasions when Lead Settlement Counsel billed an anomalous number of hours on a single day. As Lead Settlement Counsel has explained, on each occasion, the billing anomaly is traceable to his routine practice of

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[58]The inadvertently omitted hours were expended between August 3, 2004-August 21, 2004 in connection with the preparation and drafting of the appellate briefs in 04-1898(L) and related cases. The omission was caused by failing to include the time in the addition process because it was logged as a separate sub-total. See Exhibit C. Lead Settlement Counsel does not seek compensation for the omitted time, except to offset micro challenges to particular entries.

billing time within an unbroken bloc spanning two days to the date on which the unbroken bloc of work was commenced.

(a) - 9/13/03 (a Saturday) into 9/14/03 - 24 hrs. - a review of Lead Settlement Counsel's contemporaneous records reveals that he was engaged in attempting to gain more information for the deposited assets claims programs by attacking the categorical exemptions from the initial Volcker audit in the form of a motion to be filed with Judge Block, and was engaged in research and drafting of the motion and a report to the Court on his activities. The work began early in the morning and continued throughout day and into the night. The contemporaneous records contain the following notation: "all day exhausting 24 hours (no sleep)" and bear an arrow from the 13th to the 14th indicating an unbroken bloc of time beginning on one day and continuing into the next. The work on the next day involved completion of the draft motion papers, and work related to the Special Master's Interim Report on allocation. The work was continuous and ends with a notation "exhausted".

(b) 9/14/03 (a Sunday) into 9/15/03 - 20.5 hours - a review of Lead Settlement Counsel's contemporaneous time records reveals that he began working on the Interim Report on allocation on Sunday afternoon, and worked through the night until breaking for class at 10:40am, and resuming negotiations over additional information needed by the deposited assets claims process at 2:30pm, and working on the information issues into the night. The contemporaneous records indicate that over the weekend of 9/13-14/03, Lead Settlement Counsel worked without interruption on matters of importance to the class, with almost no sleep. While such extended uninterrupted periods of work are relatively rare, they are not unknown in Lead Settlement Counsel's ordinary working life.

(c) 10/13/03 (Columbus Day - a Monday holiday) into 10/14/03 - 25 hrs - a review of Lead Settlement Counsel's contemporaneous time records reveals that Lead Settlement Counsel was completing the substantial declaration and extensive memorandum of law seeking additional information for the deposited assets claims process that was scheduled for filing the next day. The contemporaneous records indicate that counsel began work on the project in the early afternoon and continued to work on it through the night. The phrase "all night" with the arrow from the Monday into Tuesday is present in the records.

(d) 10/14/03 (a Tuesday) into 10/15/03 - a review of Lead Settlement Counsel's contemporaneous records indicates that work was begun at noon on the use of presumptions by the CRT II claims program, ending at 6pm for an academic panel, but beginning immediately after the panel and continuing late into the night on issues relating to access to additional information. The records indicate that work began in the afternoon of October 14, 2003, and continued late into the night, ending with a notation "PM late exhausted"

(e) 3/26/04 (a Friday) into 3/27/03 - 16 hrs - a review of Lead Settlement Counsel's contemporaneous records reveals that he worked in the morning of 3/26/04 on the withdrawal of the fee application filed by Dr. Weiss, its impact on Mr. Dubbin's surviving application, and Dr. Weiss's alternative application for a research institute in a business school. Work resumed in the early evening on matters relating to the various claims programs and continued into the night with an arrow indicating work into the next day. A notation on 3/27/04 reads "all day//night". Work continued throughout Saturday, 3/27/04 without interruption into the night.

(f) 3/27/04 (a Saturday) into 3/28/04 - 30.5 hrs - a review of Lead Settlement Counsel's contemporary records indicates a continuation of work begun the preceding day and carrying into Sunday, consisting of completion of research and analysis of the legal issues likely to be raised in the forthcoming round of appeals. The work continued throughout the day, ending with a notion "exhausted."

(36) In fact, Mr. Swift's sneering "micro" challenges to Lead Settlement Counsel's daily billing on three sets of weekends reveals that on three weekends in 2003 and 2004, the press of business became so intense that Lead Settlement Counsel was forced to work around the clock over weekends and holidays to complete it with the level of excellence to which the class was entitled. Lead Settlement Counsel makes no apologies for such obsessive dedication, except to his family. All of Lead Settlement Counsel's work took place with the knowledge of the Court. Moreover, the work was brilliantly successful, resulting in the flow of crucial information to the deposited assets claims process, and a wholly successful defense of the allocation and implementation process. That it became necessary to sacrifice sleep and recreation to fulfil my duties cannot be turned into an excuse for refusing to compensate me for my dedicated efforts.

A Comparison with Fees in *Agent Orange*

(37) In 1985, the Judge Weinstein awarded more than $10 million in attorneys fees in the Agent Orange litigation in the context of a $180 million settlement that fell far short of the class's goals. *In re Agent Orange Prod. Liability Litig.,* 611 F. Supp. 1296, 1329-30 (EDNY 1985), aff'd,

818 F.2d 226 (2nd Cir 1987). If this fee application is granted, the total fee awards in this $1.25 billion settlement will approximate $11 million, an amount that, when adjusted for inflation, is far lower than the fee awards approved by Judge Weinstein more than 20 years ago in the far smaller and far less successful $180 million *Agent Orange* settlement.

Conclusion

On the basis of this sworn declaration, excerpts from my contemporaneous time records annexed as Exhibit C, additions to the settlement fund traceable to my efforts, and the personal knowledge of the Court concerning the extent and quality of my services as Lead Settlement Counsel, I respectfully request that the Court approve the payment of appropriate fees in connection with my post-settlement representation of the plaintiff-classes in the amount of $4, 088,500 covering the period from January 31, 1999-September 30, 2005.

March 17, 2006
New York, New York

As an attorney duly admitted to practice before this Court, I swear under penalty of perjury that the statements in foregoing declaration of Burt Neuborne, dated march 17, 2006, are true to the best of my knowledge.

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Burt Neuborne